

(15)
No. 96-1925-CFX

Title: Caterpillar Inc., Petitioner

v.
International Union, United Automobile, Aerospace
and Agricultural Implement Workers of America, et
al.

Docketed:
June 4, 1997

Court: United States Court of Appeals for
the Third Circuit

Entry Date

Proceedings and Orders

Jun 2 1997	Petition for writ of certiorari filed. (Response due August 6, 1997)
Jul 2 1997	Order extending time to file response to petition until August 6, 1997.
Aug 1 1997	Brief amicus curiae of Council on Labor Law Equality filed.
Aug 6 1997	Brief amicus curiae of Labor Policy Association filed.
Aug 6 1997	Brief of respondents International Union, et al. in opposition filed.
Aug 6 1997	Brief amicus curiae of Center on National Labor Policy, Inc. filed.
Aug 20 1997	DISTRIBUTED. September 29, 1997
Aug 22 1997	LODGING consisting of one copy of lower court record in BASF Wyandote v. Local 227 submitted by counsel for the petitioner.
Aug 22 1997	Reply brief of petitioner Caterpillar, Inc. filed.
Sep 29 1997	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 20, 1998. *****
Nov 13 1997	Joint appendix filed.
Nov 13 1997	Brief of petitioner Caterpillar, Inc. filed.
Nov 13 1997	Brief amicus curiae of Council on Labor Law Equality filed.
Nov 24 1997	Record filed.
Nov 24 1997	Record filed.
Dec 4 1997	CIRCULATED.
Dec 15 1997	Brief of respondents International Union, et al. filed.
Dec 15 1997	Brief amicus curiae of American Automobile Manufacturers Association filed.
Dec 15 1997	Brief amicus curiae of United States filed.
Dec 15 1997	Brief amicus curiae of AFL-CIO filed.
Dec 23 1997	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 5 1998	Reply brief of petitioner Caterpillar, Inc. filed.
Jan 12 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC., *Petitioner*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,
Respondents

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 302(a) of the Labor Management Relations Act forbids an employer to pay or agree to pay the union officials who represent its employees. Section 302(c)(1) exempts payments to an official who is a current or former employee if the payments are made "by reason of" the official's past or present "service as an *employee*." Sitting *en banc*, a divided Third Circuit overruled its own precedent and became the first court of appeals to accept the contention that this exemption extends to the provision of current, full-time wages to full-time union officials who no longer perform any work for the employer. According to the majority, the exemption applies simply if union officials were formerly employed by the payor and if the payments were provided for in a collectively bargained agreement.

This case thus presents the following question:

- Whether section 302(c)(1) permits an employer to pay or agree to pay the current wages of full-time union officials who are former employees of the employer but who no longer perform any work for the employer.

PARTIES TO THE PROCEEDING

The petitioner is Caterpillar Inc. The respondents are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its affiliated Local Union 786.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>American Airlines, Inc. v. Wolens</i> , 513 U.S. 219, 115 S. Ct. 817 (1995)	19
<i>American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union</i> , 665 F.2d 1096 (D.C. Cir. 1981)	25
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959)	19, 20
<i>BASF Wyandotte Corp. v. Local 227, ICWU</i> , 791 F.2d 1046 (2d Cir. 1986)	10, 11, 12, 13, 17, 22, 25
<i>Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.</i> , 799 F.2d 1098 (6th Cir. 1986), cert. denied, 479 U.S. 1086 (1987)	25
<i>Communications Workers v. Bell Atlantic Network Serv.</i> , 670 F. Supp. 416 (D.D.C. 1987)	12
<i>Costello v. Lipsitz</i> , 547 F.2d 1267 (5th Cir.), cert. denied, 434 U.S. 829 (1977)	20
<i>Electromation, Inc.</i> , 309 N.L.R.B. 990 (1993)	19
<i>Electromation, Inc. v. NLRB</i> , 35 F.3d 1148 (7th Cir. 1994)	19
<i>Employees' Independent Union v. Wyman Gordon Co.</i> , 314 F. Supp. 458 (N.D. Ill. 1970)	9
<i>Herrera v. International Union, UAW</i> , 858 F. Supp. 1529 (D. Kan. 1994)	10
<i>Herrera v. International Union, UAW</i> , 73 F.3d 1056 (10th Cir. 1996)	10
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	12, 17, 25
<i>NLRB v. Hendricks County Rural Electric Membership Corp.</i> , 454 U.S. 170 (1981)	20
<i>Newport News Shipbuilding & Drydock Co. v. NLRB</i> , 308 U.S. 241 (1939)	19

TABLE OF AUTHORITIES—Continued

Cases	Page
<i>Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.</i> , 463 F. Supp. 643 (E.D. Mich. 1978)	18
<i>Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.</i> , 634 F.2d 258 (6th Cir. 1981)	19, 17, 18
<i>Retail Clerks Int'l Ass'n v. Schermerhorn</i> , 375 U.S. 96 (1963)	24
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989)	12, 13, 14, 15, 16, 17, 25
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council</i> , 121 L.R.R.M. (BNA) 3160 (E.D. Pa. 1985)	18
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council</i> , 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932 (1986)	passim
<i>United States v. Gibas</i> , 300 F.2d 836 (7th Cir.), cert. denied, 371 U.S. 817 (1962)	20
<i>United States v. Kaye</i> , 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977)	9
<i>United States v. Pecora</i> , 484 F.2d 1289 (3d Cir. 1973)	20
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir. 1994), cert. denied, 115 S. Ct. 1312 (1995)	10, 14, 20, 25
<i>United States v. Ryan</i> , 350 U.S. 299 (1955)	9, 20
STATUTES:	
U.S. Const. art. II, § 1, cl. 5	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 2201	5

TABLE OF AUTHORITIES—Continued

Cases	Page
29 U.S.C. § 158(a)(2)	20
29 U.S.C. § 158(a)(3)	5
29 U.S.C. § 158(a)(5)	5
29 U.S.C. § 158(b)(2)	5
29 U.S.C. § 164(b)	24
29 U.S.C. § 186	passim
29 U.S.C. § 186(a)	i, 6, 8, 12, 16, 21
29 U.S.C. § 186(b)	12
29 U.S.C. § 186(c)(1)	passim
29 U.S.C. § 186(c)(5)	19, 20
29 U.S.C. § 186(c)(6)-(9)	22
29 U.S.C. § 186(e)	5
Labor Management Cooperation Act of 1978, Pub. L. No. 95-524, 92 Stat. 1909	22
MISCELLANEOUS:	
NATIONAL LABOR RELATIONS BOARD, LEGISLA- TIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT of 1947 (1985)	21, 23
93 CONG. REC. (1947)	21
H.R. REP. NO. 245, 80th Cong., 1st Sess. (1947)	23
S. REP. NO. 105-12, 105th Cong., 1st Sess. (1997)	23
Teamwork for Employees and Managers Act, S. 295, 105th Cong., 1st Sess. (1997)	23
President Clinton, <i>Remarks to the United Steel Workers Convention</i> , 32 WEEKLY COMP. PRES. DOC. 1423 (1996)	23
Chris Adams, <i>Goodyear, Steelworkers Sign Contract that Each Side Can Call a Triumph</i> , WALL ST. J., May 12, 1997, at B11	26

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INTERNATIONAL UNION, UNITED AUTOMOBILE,
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AMERICA and its affiliated LOCAL UNION 786,
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**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

Petitioner, Caterpillar Inc., respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, sitting *en banc*, App., *infra*, at 1a, are reported at 107 F.3d 1052 (3d Cir. 1997). The *sua sponte* order of the court of appeals setting this case for rehearing *en banc*, App., *infra*, at 47a, is unreported. The opinion of the district court, App., *infra*, at 49a, is reported at 909 F. Supp. 254 (M.D. Pa. 1995).

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on March 4, 1997. App., *infra*, at 46a. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (1994 & Supp. I 1995), is reproduced in the appendix in full. App., *infra*, at 66a.

STATEMENT

This case concerns a company's agreement to pay the wages of full-time union officials who no longer perform any work for the company and whose sole function is to represent the company's employees. When the union at issue demanded an increase in those payments and punctuated that and other demands with a four-month strike, the company canceled the existing wage payments to try to gain leverage in the protracted labor dispute. The union struck back by filing unfair labor practice charges with the National Labor Relations Board, insisting that the company could not lawfully stop the payments. In response, the company filed this action seeking a declaratory judgment that the payments were illegal under section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (1994 & Supp. I 1995). Sitting *en banc*, a divided Third Circuit overruled its own precedent to reverse the district court and approve the payments. This petition seeks review of that decision.

The company at issue is the petitioner, Caterpillar Inc., which manufactures earth-moving equipment and diesel engines in production facilities throughout the United States, including one in York, Pennsylvania, which is involved in this case. Appendix filed in Court of Appeals at 157-58 [hereinafter "Cir. App."]. Caterpillar is an "employer" within the meaning of section 302, and, since 1954, has recognized the respondents, the UAW and its Local 786, as the exclusive bargaining repre-

sentative of the hourly employees at the York facility. *Id.* at 158. The UAW and Local 786 (hereinafter collectively "the UAW" or "the union") are "labor organizations" within the meaning of section 302. *Id.*

The dispute in this case originated in 1973, when the UAW demanded that Caterpillar pay the salaries of certain full-time union officials. Cir. App. at 160-61, 503-04. After a strike over this and other issues, Caterpillar agreed to recognize the Chairman of the Local's Grievance Committee as a full-time union representative and to provide him with regular wages and benefits. *Id.* at 167, 542. In 1979, the company agreed to extend those payments to a full-time "Alternate Committeeman." *Id.* at 167.

The Chairman and Alternate Committeeman (hereinafter collectively the "Committeemen") represent the Local's members, interpret and enforce the collective bargaining agreement on their behalf, and engage in other activities in support of the Local. App., *infra*, at 59a-60a.¹ Even though the Committeemen were on full-time leaves of absence for union business, Caterpillar paid them regular wages and benefits under sections 4.6 and 4.7 of the collective bargaining agreement. *Id.* at 75a. Despite that remuneration, however, the Committeemen were employees of the union, not of the company. Cir. App. at 162.² Indeed, company-

¹ Significantly, the Chairman is also a member of the committee that negotiates the very collective bargaining agreements that provide for his compensation. App., *infra*, at 59a-60a.

² Every court to consider this issue has reached that conclusion. App., *infra*, at 7a, 60a, 78a-79a. The Committeemen are functionally equivalent to assistant union business agents in, for example, the construction and retail food industries. *Id.* at 76a. They conduct their business and maintain their records at the union hall, not in the plant. Indeed, the Chairman generally spends only one day per week at the plant when he is in town. *Id.* at 58a; Cir. App. at 468.

The Committeemen handled the union's business and answered only to the union. App., *infra*, at 78a-79a. Caterpillar assigned them no work and did not supervise them in their union activities. *Id.* at 58a-59a. They were "assigned" to the Labor Relations Department at the York facility for payroll purposes, but they performed no work for that department. Cir. App. at 161. They

wide, at least five individuals in similar positions have retired while on paid union leave, and several others have been on paid union leave longer than they ever served as active employees. *Id.* at 168.

Deciding in 1991 that it was "time they got a raise," the UAW demanded that Caterpillar significantly raise the wages of at least certain Committeemen. App., *infra*, at 79a; Cir. App. at 168. The change would have substantially increased what had *already* become approximately a \$2 million annual subsidy company-wide. App., *infra*, at 79a. When Caterpillar rejected this and other demands, the union terminated the expired collective bargaining agreement and engaged in a strike that ended in April 1992 without resolution of the contract issues. *Id.* at 74a-75a.

On October 30, 1992, Caterpillar informed the UAW that, although it would continue to recognize the Committeemen as union officials, effective November 16, the company would no longer pay their wages and benefits—at least not until the parties reached a new, comprehensive labor agreement that provided for lawful payments. App., *infra*, at 80a; Cir. App. at 135-36, 168-69.³ The Committeemen at the York facility chose to return to active employee status, and the Chairman then went on *unpaid* union leave to continue his duties under a different provision of the expired collective bargaining agreement. Cir. App. at 471.

merely accounted to the company for the time they claimed to have spent on union duties for which Caterpillar had agreed to pay, and if they were not going to perform those duties during a particular week, they simply notified the company of that fact. *Id.* at 161, 468, 619-24.

3 Although Caterpillar ceased paying full-time union representatives who performed no work for the company, it did not revoke its "no docking" policy. App., *infra*, at 80a. Under that long-standing company policy, *active* and full-time Caterpillar employees who also served as union stewards or part-time grievance committeemen could perform their union duties on an intermittent, *ad hoc* basis during working hours and then return to their regular jobs. They did not lose pay for reasonable time spent performing these union duties—hence, the name: "no docking" policy. *Id.* at 50a, 76a.

The union filed unfair labor practice charges challenging Caterpillar's termination of the payments. App., *infra*, at 50a-51a. Based on those charges, the General Counsel of the National Labor Relations Board issued complaints accusing Caterpillar, *inter alia*, of violating section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1994), by allegedly failing to bargain with the union before discontinuing its payments to the Committeemen. App., *infra*, at 51a. Caterpillar filed this action in the United States District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the payments violated section 302. *Id.*; Cir. App. at 83.⁴ The court granted the union's motion for a stay in deference to the NLRB proceedings, Cir. App. at 111, and the Third Circuit affirmed, *id.* at 113.

On January 31, 1995, an NLRB administrative law judge issued a Decision and Recommended Order⁵ dismissing the unfair labor practice complaints. App., *infra*, at 86a. The judge found that the Committeemen perform no productive work for Caterpillar in exchange for the payments and that Caterpillar has no control over the manner or means by which they perform their union duties. *Id.* at 78a. Describing them as the functional equivalents of "assistant business agents," *id.* at 76a, the judge further found that the Committeemen work for the union, are responsible only to the union for their work product, and answer only to the union, which determines their tenure, *id.* at 78a-79a. In light of those findings, the judge concluded that the payments violated sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), (b)(2) (1994), and surmised that they also "raise[d] a serious issue under Section 302." App., *infra*, at 81a.⁶

4 The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201, as well as under section 302(e) of the Labor Management Relations Act, 29 U.S.C. § 186(e) (1994).

5 The decision is part of the record in this case because the union attached a copy of it as an exhibit to the union's amended answer. Cir. App. at 139-148.

6 Caterpillar had based its defense to the unfair labor practice complaint on, *inter alia*, sections 8(a)(3) and 8(b)(2). The company did not raise section 302 as a defense but reserved that issue for the district court, which had jurisdiction over section 302. Given his conclusions under sections 8(a)(3)

Although the union has appealed that decision to the National Labor Relations Board, the district court lifted its stay in this action. On December 8, 1995, the court granted Caterpillar's motion for summary judgment. App., *infra*, at 63a. The court held that providing wages and benefits to the Committeemen would violate section 302(a), which makes it unlawful for an employer to "pay . . . or agree to pay . . . any money or other thing of value" to the representatives of its employees, 29 U.S.C. § 186(a) (1994). App., *infra*, at 61a-62a.

In reaching that conclusion, the court rejected the union's contention that section 302(c)(1) exempted the wages and benefits at issue from the ban. That provision allows an employer to pay a union representative "who is also an *employee* or *former employee* of such employer, as compensation for, or by reason of, his *service as an employee* of such employer." 29 U.S.C. § 186(c)(1) (1994) (emphases added). The court held that the Committeemen were not current employees of Caterpillar, because the company exercised little control over them and received only indirect benefits from the performance of their duties. App., *infra*, at 59a, 60a. Following the Third Circuit's decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), the court also held that "[t]he record here is devoid of evidence that the [Committeemen]'s wages are for services rendered while [they were] employed by Caterpillar." App., *infra*, at 61a. Observing that the union's only argument was that *Trailways* had been wrongly decided, the court responded that "even if we were inclined to agree, *which we are not*, we are without power to overrule a decision of the Third Circuit." *Id.* at 61a n.15. (emphasis added).

The union appealed, and after oral argument before a panel of the Third Circuit, the full court *sua sponte* ordered a rehearing *en banc*. App., *infra*, at 47a. On March 4, 1997, a divided Third Circuit reversed the district court, overruled the applicable part

and 8(b)(2), the administrative law judge found it unnecessary to rule on the section 302 issue, his jurisdiction over which was subject to dispute.

of *Trailways*, and held that the payments at issue would not violate section 302. *Id.* at 12a. Although the majority agreed that the Committeemen were not *current* employees of Caterpillar, *id.* at 7a, it held that the wages and benefits were payable "by reason of" their past service as employees and, as such, were exempt under section 302(c)(1), *id.* at 10a-11a. The majority's opinion turned on the fact that the payments were "bargained-for." *Id.* at 8a. The majority reasoned that

every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

Id. at 10a. The majority also opined that when Congress enacted section 302, it was concerned about only "bribery, extortion, and other corrupt practices conducted in secret." *Id.* at 12a. In contrast, the majority characterized the payments at issue as "innocuous." *Id.* at 8a.

There were two vigorous and wide-ranging dissents. In one of them, Judges Mansmann and Greenberg accused the majority of "plac[ing] its own policy objectives above plain language." App., *infra*, at 12a. Reading section 302(c)(1) as exempting only those payments made *in spite of*, not *because of*, a current or former employee's service as a union representative, *id.* at 14a-15a, the dissenters argued that wage payments to full-time union officials, like the payments at issue here, were "entirely unrelated" to the officials' past service as employees, *id.* at 15a. In addition, after reviewing the legislative history, the dissenters challenged the majority's understanding of Congress' purpose in enacting section 302. They contended that Congress "was concerned about *any* form of payment that could upset the balance between labor and management." *Id.* at 18a. Finally, after suggesting some practical difficulties with the majority's decision, Judges Mansmann and Greenberg criticized the majority for abandoning "the longstanding tradition of separation of labor and management." *Id.* at 30a.

Judge Alito filed a separate dissent. Among his numerous observations, he closely analyzed the language of section 302(c)(1) and criticized the majority for, in his view, construing the phrase "by reason of" to mean that a union representative's past service as an employee had to be merely a *but for* cause, rather than a *major* cause, of the payments at issue. App., *infra*, at 34a-35a.

Finally, all of the dissenters emphasized that they could find nothing in the statutory language or legislative history indicating that Congress had approved payments to full-time union officials simply because the payments are "bargained-for." App., *infra*, at 15a, 19a-20a, 34a, 43a.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal labor law that has vexed the lower courts but has never been addressed by this Court: May an employer pay or agree to pay the current benefits or, as here, the wages of full-time union officials who are the employer's former employees but who no longer perform any work for it? Sitting *en banc* below, a divided Third Circuit overruled its own precedent to approve that arrangement, even though section 302 of the Labor Management Relations Act broadly forbids an employer to "pay" or "agree to pay" the union representatives of its employees, 29 U.S.C. § 186(a) (1994). Payments are not unlawful, the majority held, if they are "bargained-for" and flow to union officials who once worked for the employer.

The unlikely foundation for that holding was section 302(c)(1), 29 U.S.C. § 186(c)(1) (1994), which accommodates union representatives who are regular workers. Under that provision an employer may pay a worker—*notwithstanding her service as a representative*—if the pay is owed "as compensation for, or by reason of," her past or present "service as an *employee*," 29 U.S.C. § 186(c)(1) (emphasis added). Despite this provision's common-sense purpose, recent attempts to interpret it have produced inter-circuit disagreement, if not disarray, demonstrating

that the lower courts need guidance in this confused but critical area of the law. Moreover, construing section 302(c)(1) to allow wage payments for work as a full-time union agent, as the majority below did, requires an unjustifiable leap and, at core, a fundamental change in the federal policy favoring labor-management independence. Now that one circuit has given its virtually unconditional imprimatur to such a change without even acknowledging the countervailing concerns voiced by the United States, the urgency for review is heightened—particularly since the very collaboration that gives rise to these agreements also prevents them from reaching this Court except on rare occasions like this one.

1. *The lower courts have proved incapable of achieving a consistent interpretation of section 302(c)(1).* Historically, courts have given the plain language of section 302 a straightforward interpretation.⁷ Of particular relevance here, lower courts have repeatedly refused to accept labor's rationalization that section 302(c)(1) allows employers to pay full-time union representatives under the theory that the representatives are "employees." Although employers may indirectly benefit from the activities of union representatives, the lower courts are in agreement that those representatives are employees, not of the employer, but of the union, which primarily benefits from and controls their activities. *See Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 864-65 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *accord* App., *infra*, at 8a.⁸

⁷ *See, e.g., Arroyo v. United States*, 359 U.S. 419, 424 (1959) (calling for "literal," "common-sense" construction); *United States v. Ryan*, 350 U.S. 299, 304-05 (1955) (holding section 302 should be construed broadly enough to accomplish its purposes).

⁸ Until recently, the only deviation from this holding involved very limited "no docking" policies applied to active employees. *See Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970) (upholding policy allowing attendance at monthly grievance meetings without loss of pay).

Achieving little success with this "employee" argument, labor has recently pressed a more elaborate "fringe benefit" theory. Under that theory, if a union representative is, or ever has been, an actual employee of an employer, then that employer may lawfully pay the representative for her union activities as a kind of fringe benefit payable "by reason of" her present or past "service as an employee," 29 U.S.C. § 186(c)(1).⁹ This argument has left the lower courts in substantial disagreement, if not disarray. Beginning with *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), the six appellate decisions to consider this rationale¹⁰ have produced no fewer than four different interpretations of the phrase "by reason of . . . service as an employee." The Third Circuit alone has propounded two, overruling *Trailways* to adopt its current view in this case.

In *Trailways*, the Third Circuit first confronted the union's fringe benefit argument and rejected it in favor of a straightforward interpretation of section 302(c)(1). The court held that an employer could not make pension contributions on behalf of individuals who had left its employ to become full-time union agents. The union argued that the contributions were payable to the agents "by reason of" their past service as employees because the agents would not have been eligible to receive the contributions *but for* that past service. *Id.* at 105. Rejecting that argument

9 At least until the present case, the circuits seemed to agree that the phrase "as compensation for . . . service" in section 302(c)(1) refers to wages, while the phrase "by reason of . . . service" refers to non-wage benefits. See *United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046, 1049 (2d Cir. 1986).

10 This discussion excludes *Herrera v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996). In that terse decision, the Tenth Circuit upheld a "no docking" policy by simply adopting the analysis of the district court, which, in any event, provided no useful discussion of section 302(c)(1), *see, e.g., Herrera v. International Union, UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994) ("[T]he law is clear that payments to union officials for time spent on union business does not violate [section 302].").

as a *non sequitur*,¹¹ *id.* at 106, the Third Circuit held that section 302(c)(1) allows payments to former employees only *in exchange for* "past services actually rendered by those former employees while they were employees of the company." *Id.* at 106 (emphasis omitted). Applying that test, the court concluded simply that the pension contributions at issue were in reality a form of remuneration for *present* services to the union, *see id.* at 106 & n.5, and, as such, were unlawful.

Almost simultaneously, the Second Circuit effectively embraced the dubious *but for* interpretation. In *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046 (2d Cir. 1986), the Second Circuit approved an extensive "no docking" scheme under which current employees who were also shop-floor union representatives could regularly devote up to four hours a day to union activities without losing any pay. The Second Circuit held that the *only* question was whether that policy applied to activities "engaged in by one who is a bona fide employee of the payor." *Id.* at 1049 (emphasis added). In other words, if one would not have been eligible to receive pay for union activities *but for* one's status as a *bona fide* employee, then the pay was available "by reason of . . . service as an employee."¹²

Although the "no docking" scheme did not give the Second Circuit an opportunity to consider how the *but for* test would apply if the wage payments were made to *former* employees,¹³

11 As one of the dissenters in the present case aptly observed, "it would be ridiculous to say that [Bill Clinton] became President 'by reason of' having attained his thirty-fifth birthday," simply because he would have been ineligible for the office *but for* having reached age 35. App., *infra*, at 35a (Alito, J., dissenting); *see* U.S. CONST. art. II, § 1, cl. 5.

12 That interpretation is untenable, for it renders the phrase "as compensation for, or by reason of . . . service as an employee" mere surplusage. The question under section 302(c)(1) is not whether the union representative being paid is also a current or former employee—that is *presumed*. The question is whether the pay is remuneration for services the representative rendered in an *employee* capacity or in a *union* capacity.

13 Because the case involved a "no docking" scheme, which the court expressly noted is, by its very nature, available only to current employees, the court

the court stressed that full-time pay to an individual who performed *no* services for an employer was not permissible:

[W]e do not suggest that [section 302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work. Such an official would not be a bona fide "employee" within the meaning of the statute, and this would be precisely the kind of device that §§ 302(a) and (b) were designed to prevent.

Id. at 1050;¹⁴ accord *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986) ("A union official put on an employee payroll but assigned no meaningful work for the employer would not amount to a 'bona fide employee,' and payments to him would violate § 302.") (dictum).¹⁵

In considering a pension benefit scheme similar to that at issue in *Trailways*, the Seventh Circuit followed neither *Trailways* nor the *BASF* decisions but, instead, adopted a third interpretation. In *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989), the Seventh Circuit reviewed a policy retroactively granting pension credit to former employees for time during which they served as full-time union representatives. Although this *retroactive* credit necessarily could not have qualified

expressly reserved any questions concerning payments made to former employees. See 791 F.2d at 1049 n.1.

¹⁴ Although this strong note of caution indicates that the Second Circuit would not have extended its *but for* analysis to full-time union agents who happened to be former employees, one district court before the present case did precisely that. See *Communications Workers v. Bell Atlantic Network Serv.*, 670 F. Supp. 416, 419-20 (D.D.C. 1987). Dissenting in the present case, Judge Alito contended that the Third Circuit majority also adopted a *but for* test. App., *infra*, at 35a.

¹⁵ The Fifth Circuit rejected the employer's contention that it was not required to bargain with the union before unilaterally discontinuing a "no docking" policy because the policy violated section 302. In reaching that conclusion, the Fifth Circuit adopted the Second Circuit's reasoning in its *BASF* decision—including the *but for* test—with virtually no independent analysis. See 798 F.2d at 855-56.

under *Trailways* as payment offered *in exchange for* services as an employee, the Seventh Circuit refused to adopt that standard. Instead, the court held that the statute's "by reason of" language required simply that employer payments be "in some way *motivated by past services*." *Id.* at 1304 (emphasis added). The Seventh Circuit concluded that the employer's purposes in awarding the pension credits—to encourage the union to select the employer's workers as agents and to provide a "good will" gesture to those selected—were sufficiently related to the beneficiaries' past service to satisfy the "by reason of" requirement. *Id.* at 1301.

The Seventh Circuit realized, however, that its broad reading of the "by reason of" language threatened to overwhelm the ban on employer payments itself. *Id.* at 1304. To avoid that result, the court grafted some non-textual limitations onto section 302(c)(1). The Seventh Circuit held that payments to former employees are permissible only if they are "openly collectively bargained;"¹⁶ are included in a "generally disseminated," "uniformly applicable," and "nondiscriminatory" collective bargaining agreement; are not "incommensurate" with the former employment; and are largely non-discretionary. *Id.* at 1304-05. Whether desirable or not, none of those restrictions are to be found anywhere in the text or legislative history of section 302.¹⁷

Even with this free-reining interpretation of section 302(c)(1), the Seventh Circuit nonetheless expressly disclaimed the legality of wage payments to full-time union agents who performed no work for an employer. Reinforcing the admonitions of the Second and Fifth Circuits that such payments would be illegal, the Seventh Circuit indicated that they would not be "commensurate" with past service and, therefore, could not "rea-

¹⁶ The Seventh Circuit concluded that the policy at issue in *Toth* was illegal because it had been implemented unilaterally, not collectively bargained. 883 F.2d at 1305.

¹⁷ Indeed, in seeking to achieve an acceptable "balance," the Seventh Circuit did not even attempt to conceal its raw policy judgment. See 883 F.2d at 1304-05.

sonably be said to be compensation 'by reason of' service as an employee." *Id.* (paraphrasing the Second Circuit's *BASF* opinion).

In the last appellate decision before the present case, the Eleventh Circuit adopted the *Trailways* interpretation. In *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), the Eleventh Circuit reviewed the same pension policy that had been at issue in *Toth* but did not embrace the Seventh Circuit's complex, non-textual construction of section 302(c)(1). Instead, the Eleventh Circuit utilized the *Trailways* standard.¹⁸ It opined, however, that employer pension payments to a former employee would be permissible only if the employee's right to the payments *vested* before the end of her employment. *Id.* at 1575. Because the employer had instituted the *retroactive* pension policy at issue after the departure of its intended beneficiaries, the Eleventh Circuit held that it was unlawful. *Id.* at 1576.

Even though the Eleventh Circuit had rendered a persuasive opinion based on *Trailways*, a divided Third Circuit sitting *en banc* overruled the relevant portions of *Trailways* in the present case and adopted yet another interpretation of section 302(c)(1). In essence, the majority held that employer payments to a union representative who is a former employee are made "by reason of" the representative's past "service as an employee" whenever a collective bargaining agreement provides for the payments. *See App., infra*, at 11a-12a. Building on its view that any benefit in a labor contract is, *ipso facto*, part of the consideration for an individual's service as an employee, the majority reasoned that

¹⁸ The Eleventh Circuit upheld a jury instruction that had been drawn verbatim from language in *Trailways* that the Seventh Circuit had expressly repudiated. *Compare Trailways*, 785 F.2d at 106 ("[T]he statute contemplates payments to former employees for past services actually rendered by those former employees while they were employees of the company." (emphasis omitted)) with *Phillips*, 19 F.3d at 1574 (quoting jury instruction that construed section 302(c)(1) to apply "only to payments by an employer to a former employee for past services actually rendered by those former employees while they were employees of the employer company" (emphasis omitted)).

a contractual provision authorizing employer payments to full-time union representatives renders those payments consideration owed "by reason of . . . service as an employee." *Id.* at 10a-11a. Although the payments at issue flowed to *former* employees who were no longer covered by the labor contract, the majority accounted for that problematic fact by hypothesizing an implicit compact by which each employee, while still an employee, allegedly agreed to forgo "a small amount in current wages in exchange for a promise that, if he or she should *someday* be elected grievance chairperson, [the employer] would continue to pay his or her salary." *Id.* at 10a (emphasis added). Thus, under the majority's elaborate construct,¹⁹ an employer's payment of wages to a full-time union representative for an indefinite period of time supposedly constitutes the fulfillment of some option that each employee implicitly purchases with an unspecified but presumed reduction in the level of wages she might otherwise receive.

The majority's focus on the collective bargaining process in applying section 302(c)(1) recalls the Seventh Circuit's approach in *Toth*—but not in one crucial respect. Apart from the requirement of "bargaining," the Third Circuit majority jettisoned all the non-textual limitations that the Seventh Circuit—devised to prevent section 302(c)(1) from overwhelming the prohibition on employer payments where a union agent happens to be a former employee. Nothing in the opinion of the majority below even hints that the amount of pay to a union agent must be commensurate with past service; that the payments must be included in a generally disseminated, uniformly applicable, and nondiscriminatory collective bargaining agreement; or that the provision of payments must be non-discretionary. Although the Third Circuit majority may be somewhat less vulnerable to the charge of judicial legislation than the Seventh Circuit, the majority's decision below simply defers to the collective bargaining process and

¹⁹ The majority conjured this supposed agreement out of thin air. Absolutely nothing in the record even hinted at the existence of such a deal, and the majority did not pretend that anything did.

drains section 302(c)(1) of virtually any substantive content. It places no *a priori* restrictions on the types of payments that an employer and a union may agree to characterize as payable "by reason of" past service, as long as the recipient has some period of prior employment with the payor.²⁰

Indeed, the United States, as *amicus curiae* below, keenly perceived the danger inherent in such an unfettered deference to collective bargaining. Although the Government sought reversal of the district court's ruling in this case, it urged a remand, so that the court could apply a number of *Toth*-like limitations. Like the Seventh Circuit, the United States was concerned about cases in which payments were "clearly so incommensurate with [a union representative's] former employment as not to qualify as payments 'in [sic] compensation for or by reason of' that employment." Amend. Br. for the United States as Amicus Curiae at 27 (quoting *Toth*, 883 F.2d at 1305). In addition, the United States suggested it was relevant whether the paid union representative happens to be an individual who had "worked in the

²⁰ This reasoning injects an intolerable circularity into section 302. While section 302(a) prohibits an employer from "agree[ing] to pay" union representatives, the majority's interpretation of section 302(c)(1) exempts from that prohibition payments to a union agent that an employer has *agreed to pay*. Thus, as long as a union agent is a former employee, section 302(a) would prohibit an employer from agreeing to pay only that which he has not agreed to pay.

The reasoning also sets up an utterly irrational distinction. By allowing payments to union representatives who were former employees but not to those who were never employees of the payor, the decision below suggests that past service as an employee somehow makes a union representative less susceptible to the kind of influence against which section 302 is directed. The irrationality of that distinction may lure lower courts into taking the small additional step of holding that an employer may lawfully pay the wages of full-time union representatives who were *never* its employees. If, as the majority held below, the payments at issue were purchased by employees as consideration for their services, one could easily extend the logic and characterize wage payments to a union representative who was never an employee as simply the employer's provision of a fringe benefit to its employees (*i.e.*, "free union representation") payable indirectly to (and implicitly purchased by) its current employees.

bargaining unit" and had been "elected to his position by his fellow employees" and is receiving pay that is "dependent on and limited to [the representative's] continuing role in the grievance process." *Id.* at 24. Finally, the United States called for courts to "closely scrutinize[]" cases in which the payments are made "to an individual who negotiates the terms of those payments" or "to an individual who has not worked for the company in his regular job for an extended period" and "is unlikely to return to such work." *Id.* at 28.²¹ Although the petitioner agrees with Judge Alito below that none of these requirements can be "tease[d]" from the language of section 302(c)(1), App., *infra*, at 44a n.6, they do vividly anticipate the mischief that the Third Circuit, by rejecting these and the Seventh Circuit's limiting principles, could unleash.

Furthermore, the decision below does not merely contradict *Toth* by disregarding its non-textual provisos. In the name of a newfound faith in the ability of employers, unions, and member-employees to self-regulate potentially corruptive practices through collective bargaining, the majority disregarded *Bechtel*'s insistence that the union recipient be providing services to the employer as an employee. The majority also abandoned *Trailways*' requirement that employees or former employees be paid only *in exchange for* actual services rendered to the employer. The majority similarly discarded the requirement of the *BASF* decisions that union recipients of employer payments be *current-bona fide employees* of the employer. And most troubling of all, the majority ignored the expressed concerns of other courts about wage payments to *full-time* union representatives. The Second, Fifth, and Seventh Circuits have strongly indicated that such payments are unlawful,²² and the Sixth Circuit, in its *Bechtel* deci-

²¹ In fact, each of those scenarios is present in this very case, *see supra* note 1 & pp. 3-4.

²² Indeed, even in the Third Circuit views are sharply split, as the decisions in *Trailways* and the present case demonstrate. If one considers the opinions of both the district and appellate courts in those two cases, nine judges have found payments lawful, while seven have concluded they are unlawful. Compare App., *infra*, at 1a (opinion of Nygaard, J., joined by Sloviter, C.J.,

sion, gave no hint that its view of the legality of employer wage payments at issue there turned on the status of a union representative as a former employee.²³ Dismissing these warnings, the majority below made the Third Circuit the first ever to approve a scheme whereby employers may pay full-time salaries—apparently at whatever levels negotiations will bear—to full-time union representatives who do absolutely no work for the employer.

A decade after the debut of labor's fringe benefit argument, the circuits are fragmented with no resolution in sight, and the meaning of section 302(c)(1) is more muddled than ever. Indeed, there are no fewer than four established interpretations of the phrase "by reason of . . . service as an employee." The Third Circuit says it means whatever the parties say it means through collective bargaining, while the Seventh Circuit, though also favoring the idea of bargaining, contends that the payments must be "motivated by" past service and imposes a laundry list of substantive regulations that the court simply manufactured. The Second and Fifth Circuits, in contrast, have read the phrase "by reason of" as synonymous with *but for* causation. And the Eleventh Circuit has imported the Third Circuit's late *Trailways* standard, requiring that remuneration be part of a payment for the actual rendition services as an employee. Therefore, a decade's

and Becker, Stapleton, Scirica, Cowen, Roth, Lewis, and McKee, JJ., holding payments lawful) and *Trailways*, 785 F.2d at 108 (Becker, J., dissenting) with App., *infra*, at 12a (Mansmann, J., joined by Greenberg, J., dissenting); *id.* at 30a (Alito, J., dissenting); *id.* at 49a (opinion of Caldwell, J., holding payments unlawful); *Trailways*, 785 F.2d at 102 (opinion of Garth, J., joined by Van Dusen, J., holding payments unlawful); and *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 121 L.R.R.M. (BNA) 3160, No. 84-4703 (E.D. Pa. Feb. 13, 1985) (opinion of Weiner, J., holding payments unlawful).

23 Under the scheme at issue in *Bechtel*, members of an employers' association were required to contribute to a trust fund to pay the salary of an industry steward. In all likelihood, the steward would have been a former employee of at least one of the employers in the employers' association, *see infra* note 30, but the opinions of neither the Sixth Circuit nor the district court—both holding the payments unlawful—provide any clue about the current steward's employment history. *See Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981), *aff'd* 463 F. Supp. 643 (E.D. Mich. 1978).

experience shows that, far from providing "a closer working out" of the issues, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, ___, 115 S. Ct. 817, 827 (1995) (internal quotation marks omitted), the circuits are struggling at such cross-purposes that they are now further than ever from agreeing on an underlying theory of section 302(c)(1). The present case presents this Court with an excellent opportunity to provide the kind of basic guidance that will fundamentally orient the lower courts in a consistent direction and facilitate the further development of the law in this area.

2. *The decision below introduces a fundamental change in federal labor policy that should be left to Congress.* The Third Circuit's unlimited bargaining interpretation of section 302(c)(1) significantly alters a fundamental premise of federal labor policy: the independence of labor from management. By giving employers and union negotiators virtually *carte blanche* to authorize employer payments to union representatives who are former employees, the Third Circuit has breached the policy of financial self-reliance that was designed not only to prohibit intentional acts of bribery, but also, at least in part, to prevent unions from developing addictions to employer subsidies. Indeed, the majority below went so far as to allow an employer to pay the very wages of full-time union agents. Whether this substantial "blur[ring of] the important line between labor and management" is desirable, App., *infra*, at 29a (Mansmann, J., dissenting), such a major change in policy should be left to Congress.

The idea that unions should be independent of employers is pervasive in federal labor law. From early resistance to employer-dominated "company unions," *see, e.g., Newport News Shipbuilding & Drydock Co. v. NLRB*, 308 U.S. 241 (1939), to recent controversies over joint labor-management committees, *see, e.g., Electromation, Inc.*, 309 NLRB 990 (1993), *enf'd*, 35 F.3d 1148 (7th Cir. 1994), the premise that labor should remain free from undue influence by management has been a constant.²⁴

24 In fact, in construing section 302(c)(5) in *Trailways*, the Third Circuit noted

Congress has even made a variation on the policy explicit in section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2), by forbidding employers to “dominate,” “interfere with,” or “contribute financial support” to unions. As Justice Powell observed in *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981), this principle of labor independence is “fundamental to the industrial philosophy of the labor laws in this country.” *Id.* at 193 (concurring in part and dissenting in part); *see also* App., *infra*, at 29a (Mansmann, J. dissenting).

Section 302 implements this principle of labor-management independence by forbidding employer payments to union representatives. Although the majority below assumed Congress was concerned about only “bribery, extortion and other corrupt practices conducted in secret,” App., *infra*, at 12a (emphasis added), Judge Mansmann correctly pointed out that section 302 sweeps much more broadly than the majority suggested: “Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management.” *Id.* at 18a (dissenting opinion). In fact, section 302 is a broad conflict-of-interest statute, *Phillips*, 19 F.3d at 1574—a “prophylactic” measure, *Costello v. Lipsitz*, 547 F.2d 1267, 1273 (5th Cir.), *cert. denied*, 434 U.S. 829 (1977).²⁵ It maintains the independence of labor by forbidding even “innocuous” employer payments, App., *infra*, at 8a, that could be corrosive over time.²⁶

the “inherently adversarial relationship” between labor and management. 785 F.2d at 108.

²⁵ For instance, Congress did not enact section 302 merely “to duplicate state criminal laws” banning bribery and extortion, *Arroyo v. United States*, 359 U.S. 419, 425 (1959), with their requisite element of scienter, *United States v. Ryan*, 350 U.S. 299, 305 (1956) (“As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative.”); *see also* *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973) (holding Section 302 did not require showing of “corrupt purpose”); *United States v. Gibas*, 300 F.2d 836, 840 (7th Cir.) (same), *cert. denied*, 371 U.S. 817 (1962).

²⁶ As the Third Circuit itself previously observed in *Trailways*, payments made to union representatives who are former employees “may not at first blush

Although the majority below based its interpretation of section 302(c)(1) on the premise that “bargained-for” employer payments were consistent with congressional policy underlying section 302, App., *infra*, at 8a, that premise is flawed. Section 302 generated intense debate in Congress²⁷—and *not* because it simply banned bribery and extortion. The measure stirred passions precisely because it placed substantive limits on the terms that employers and union negotiators could *agree to include* in a collective bargaining agreement.²⁸ Opponents vigorously decried section 302 as interfering with free collective bargaining.²⁹ Indeed, section 302(a) expressly provides that an employer may not “agree to pay” a union representative. 29 U.S.C. § 186(a) (emphasis added). Congress manifestly intended to protect union

be the kinds of payments thought to lead to corruption of union officials, *the potential for such corruption*, or at least the appearance of it, nevertheless remains.” 785 F.2d at 108 (emphases added).

²⁷ *See, e.g.*, 93 CONG. REC. 4883 (1947) (colloquy between Sens. Ball and Barkley), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1321-22 (1985) [hereinafter LEG. HIST.].

²⁸ Senator Taft, who led the movement to enact the Labor Management Relations Act in 1947, insisted that “certainly there should be some restriction on the right of those who bargain collectively for the employees . . . as to how far they can take the money earned by the employees and use it for union purposes without restriction.” 93 CONG. REC. 4876 (statement of Sen. Taft), *reprinted in* 2 LEG. HIST. at 1311.

Furthermore, in stark contrast to the Third Circuit’s theory that employer payments are permissible *when* they are bargained in exchange for reduced current wages, the sponsor of the amendment that became section 302 expressed his outrage that in some instances “unions have even relinquished *wage demands* in order to secure” a particular form of employer payment. 93 CONG. REC. 4805 (statement of Sen. Ball) (emphasis added), *reprinted in* 2 LEG. HIST. at 1305.

²⁹ For instance, as one opponent of section 302 put it, “[t]his is another one of those instances where it seems that certain individuals do not credit the union membership with any authority whatever over the selection of or the conduct of their own leaders.” 93 CONG. REC. 4806 (statement of Sen. Pepper), *reprinted in* 2 LEG. HIST. at 1306.

members from certain arrangements that their own leaders might negotiate with their employers.

The Third Circuit majority's unlimited bargaining interpretation of section 302(c)(1), however, allows the very type of agreement between labor officials and management that Congress intended to outlaw. The majority has all but eviscerated the prohibition of section 302 by allowing labor and management to collectively bargain around its restrictions. An employer and a union can strike a deal to pay the salary of a union official, regardless of rank or function and, apparently, need only point to some period of employment with the payor, however brief, in order to thread the deal through section 302(c)(1). If this precedent is allowed to take root, unions and employers will have tremendous discretion to make unions financially dependent on employers and, conversely, allow employers to gain financial leverage over unions.³⁰

A majority of the judges sitting on the Third Circuit would apparently implement this dramatic change in labor policy in hopes of fostering greater labor-management "cooperation." But this kind of radical revision of the sixty-year-old principle of labor-management independence should be left to the judgment of Congress, which has shown that it is ready to amend section 302 when the need arises and a consensus coalesces. Since Congress enacted section 302 in 1947, it has added four additional exceptions to the prohibition on employer payments to union representatives. See 29 U.S.C. § 186(c)(6)–(9) (1994). Indeed, in 1978 Congress even amended section 302 to sanction some *specified* forms of labor-management cooperation. See Labor Management Cooperation Act of 1978, Pub. L. No. 95-524, 92 Stat. 1909; *BASF*, 791 F.2d at 1053 (discussing amendment). History

³⁰ Salaries of staff personnel and officials are obviously a union's major expense. In most labor organizations, virtually all union officials are initially drawn from some employer's work force. The Third Circuit's decision allows funding the salaries of union officials, whether local or international, elected or appointed, for months, years, or even decades, regardless of how long or brief the officials' shop floor service.

also shows, however, that such amendments often involve highly contentious value judgments and political compromises best left to the legislative process.³¹ Judge Mansmann struck the proper judicial chord below:

I applaud labor-management efforts to retreat from the adversarial approach that has often marred the labor landscape in this country. I believe, however, that the payments sanctioned by the majority go too far. The financial support sought by the United Auto Workers in this case contravenes the long-standing tradition of separation of labor and management. . . . It is for Congress, not the courts, to determine if and when to permit labor organizations and employers to blur the line between them.

App., *infra*, at 30a (dissenting opinion).

A more practical reason for leaving such major policy changes to Congress is that such changes must be woven into the broader fabric of labor law. Here, for example, the majority has created a new conflict within federal labor policy. As noted previously, the majority justified its holding below by supposing that each employee had implicitly accepted a wage reduction in exchange for a contingent right to wages should any of them ever *someday* become a union representative. But this assumed

³¹ See, e.g., Teamwork for Employees and Managers Act, S. 295, 105th Cong., 1st Sess. (1997) [hereinafter "TEAM Act"]; S. Rep. No. 105-12, 105th Cong., 1st Sess., 1997 WL 159793 (Leg. Hist.) at *53 (April 2, 1997) (minority views) ("[T]he Committee has voted along party lines to report this bill, whose sole purpose is to make company-dominated forms of employee representation lawful."); President Clinton, *Remarks to the United Steel Workers Convention*, 32 Weekly Comp. Pres. Doc. 1423 (1996) ("The Congress tried to make company unions the law of the land, and I wouldn't let them do that . . . I vetoed the TEAM Act.") (describing prior version of TEAM Act); H.R. Rep. No. 245, 80th Cong., 1st Sess. at 85 (1947) (minority views) (A joint labor-management committee "could only be the nucleus for a company-dominated organization. It is the beginning of the imposition on employees of many employers' desire for a subservient labor organization."), reprinted in 1 Leg. Hist. at 376.

trade, if it ever really happened, contradicts the statutory right of an employee to *refrain* from union membership. Under the majority's theory, a union and its members may effectively force non-members—who are not even be entitled to vote on the collective bargaining agreement—to fund the salaries of union officers by way of reduced wages borne by all employees rather than through the dues of those who choose to join the union. The decision thus threatens to drive truly open shops into irrelevance, if not extinction, and nullify state “right to work” laws that guarantee non-union workers the right to shield their hard-earned money from union tax collectors. *See Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96 (1963) (holding section 14(b) of National Labor Relations Act, 29 U.S.C. § 164(b) (1994), gives states power to prohibit so-called “agency shops”). Resolution of that conflict—or, more correctly, whether to create it in the first place—should be left to the political judgment of Congress.

3. *This Court should review the judgment of the Third Circuit because silent collaboration between employers and unions offers only rare opportunities to review this issue.* If this Court does not review the judgment of the Third Circuit in this case, it may be many years before another opportunity will present itself precisely because the kind of financial arrangements at issue here have no “natural enemy.” They usually result from collaboration between union officials and employers. Unions enjoy the income they receive from these deals,³² and companies are drawn to the leverage they believe they gain in the bargain.³³ As a result, when these arrangements do come to light, it is often in extreme cases that do not present courts with the kind of straightforward

32 Here, that income had grown to \$2 million per year and, at the time the company finally cried foul, the union was demanding still more. App., *infra*, at 79a.

33 Companies presumably like the peace such financing buys and the leverage and pressure point it affords. As Judge Alito pointed out in dissent below, this case arose because the company cut off the payments in order to place economic pressure upon the union leadership in a labor contract dispute, and the union initiated proceedings to force continued payments. App., *infra*, at 43a.

opportunity that is available in this case to interpret section 302. *Toth* and *Phillips*, for instance, involved the same scheme, which so approached outright bribery that federal prosecutors obtained criminal convictions in the matter. *See Phillips*, 19 F.3d at 1567-73 (describing scheme).³⁴

Furthermore, the law cannot depend solely on “rank-and-file” employees to enforce the requirements of section 302. Neither the union member³⁵ nor his non-member co-worker—both of whom section 302 was designed to protect—may even be aware of the concessions union negotiators offered in order to secure wage payments for full-time union officials. In fact, contrary to the apparent assumption of the majority below, App., *infra*, at 12a, non-member employees generally cannot vote on whether to ratify their bargaining unit’s collective bargaining agreement, and nothing in federal labor law provides even union members with a right to vote on ratification. *See, e.g., Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1111 (6th Cir. 1986) (*en banc*) (“A collective bargaining agreement must be ratified by a union’s membership *only if* the union’s constitution, by-laws or rules and regulations create such a requirement. *There is no independent requirement in federal law of ratification by a union.*” (internal quotation marks omitted; emphases added)), *cert. denied*, 479 U.S. 1086 (1987); *accord American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1101 (D.C. Cir. 1981). Indeed, collective bargaining agreements are frequently long-term,³⁶ complex documents that sometimes

34 Since the *BASF* cases both involved “no docking” rules, rather than wage payments to full-time union representatives, only one appellate case has come close to presenting that issue cleanly, and it was *Trailways*, decided over ten years ago. Indeed, even *Trailways* involved the payments of only pension contributions.

35 Even union members are likely to vote their short-term economic interests as they lower their dues and pass the cost of their organization on to their employer and, ultimately, all employees, whether members of the union or not.

36 For example, the recent Steelworker-Goodyear national agreement will run

run into the hundreds of pages.³⁷ A clause providing employer payments to full-time union representatives could remain buried in such an agreement, implemented without question for long periods of time.

Before the decision below opens the floodgates so that a torrent of new wage, salary, and other so-called "fringe benefits" for full-time union officials can surge through section 302(c)(1), this Court should make absolutely certain that the majority's unlimited bargaining interpretation is a sound one. If it is not, but that conclusion becomes clear only later, there will be quite a mess to mop up.

for approximately six years. Chris Adams, *Goodyear, Steelworkers Sign Contract that Each Side Can Call a Triumph*, WALL ST. J., May 12, 1997, at B11.

³⁷ Here, the contract had twenty-one articles, one hundred and sixty sections, and thirty side letters of agreement *plus* pension, health insurance, life insurance, sickness and accident insurance, supplemental unemployment insurance, legal services, and numerous other benefit plan documents. See Central Agreement between Caterpillar Inc. and the UAW and Local Supplement for the York Plant and Local Union 786 (Oct. 21, 1988) (part of record below).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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JUNE 1997

Appendix

Filed March 4, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation doing
business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA; and its affiliated
LOCAL UNION 786,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 92-01854)

Argued August 8, 1996

Before: NYGAARD, LEWIS and McKEE, *Circuit Judges*.

Reargued December 2, 1996

Before: SLOVITER, *Chief Judge*, and BECKER,
STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE,
Circuit Judges.

(Opinion filed March 4, 1997)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

In this appeal, we must decide whether an employer granting paid leaves of absence to employees who then become the union's full-time grievance chairmen violates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The district court held that this practice is illegal, relying on our decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986). We will reverse, and in doing so, overrule significant portions of *Trailways*.

I.

The facts are stated comprehensively in the district court's opinion, *Caterpillar, Inc. v. International Union, United Automobile Workers*, 909 F. Supp. 254 (M.D. Pa. 1995). For our pur-

poses it suffices to recount that the United Auto Workers, its Local 786 and Caterpillar have been parties to a collective bargaining agreement since 1954. Until 1973, the agreement contained a "no-docking" provision allowing employees who were also union stewards and committeemen to devote part of their work days to processing employee grievances without losing pay, benefits or full-time status. In 1973, this agreement was expanded to allow the union's full-time union committeemen and grievance chairmen to devote their entire work week to union business without losing pay. These employees are placed on leave of absence and are paid at the same rate as when they last worked on the factory floor. They conduct that business from the union hall, perform no duties directly for Caterpillar, and are not under the control of Caterpillar except for time-reporting purposes.

In 1991, a nationwide labor dispute erupted between Caterpillar and the union, which resulted in the employees returning to work without a contract. A year later, Caterpillar unilaterally informed the union that it would cease paying the grievance chairmen and questioned the legality of such payments, notwithstanding that it had paid them without complaint for eighteen years. The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that, by unilaterally rescinding the payments, Caterpillar refused to bargain in good faith. A month later, Caterpillar filed this suit seeking a declaratory judgment that those payments violate § 302 of the LMRA.

The district court stayed its proceedings pending the decision of the NLRB. An administrative law judge later issued a recommended decision and order dismissing the union's charges, finding that the payments violated § 8 of the National Labor Relations Act.¹ The district court then lifted the stay and held that Caterpillar's payments to the union's full-time grievance chairmen violated § 302. The union now appeals.

¹ The ALJ, while questioning the validity of the payments under § 302 of the LMRA, did not reach that issue in his proposed holding.

II.

A.

Section 302(a) of the LMRA provides:

It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce[.]

29 U.S.C. § 186(a). Caterpillar is an employer in an industry that affects commerce and the grievance chairmen are representatives of Caterpillar's employees. On the face of § 302(a), then, Caterpillar's wage payments to them would appear to be unlawful. Section 302(c), however, provides that

[t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer . . . to any representative of his employees, . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]

29 U.S.C. § 186(c)(1). Thus, if the grievance chairmen receive their compensation "by reason of" their "service as employees," then Caterpillar's wage payments are lawful.

In *Trailways*, the employer agreed to continue making contributions to a joint union-management trust fund on behalf of employees who had taken leaves of absence to devote their time to full-time union positions.² There, the union argued that those

² One issue before the court was whether the payments were lawful under § 302(c)(5), which grants an exception for payments to pension trust funds.

payments could pass muster under § 302(c)(1), which permits payments to former employees "as compensation for, or by reason of, [their] service as . . . employee[s.]" The *Trailways* court rejected that possibility as a matter of statutory construction, opining:

To the Union, the pension fund contributions made on behalf of former employees currently on leave to serve as union officials were earned solely "by reason" of their past service to Trailways. But for their past employment by Trailways, the Union contends, these officials would not be eligible for pension fund contributions; therefore, these payments are "by reason of their service as an employee of" Trailways.

A logical reading of the statute makes clear that the "payments to former employees' exemption" of § 302(c)(1) applies solely to payments made as "compensation or by reason of" the former employees *past* service to the employer. While the Union is correct in asserting that had these individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways pursuant to the collective bargaining agreement were made "in compensation for, or by reason of," their *former* service to Trailways so as to fall within the § 302(c)(1) exception. Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company*. Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as union officials while on leave

The *Trailways* court concluded, however, that the § 302(c)(5) exception applies only to current employees and held that the union officials did not fit that description because Trailways did not have sufficient control over their work and because their work was solely for the benefit of the union. 785 F.2d at 104-07.

from Trailways are not compensation for their past service to Trailways.

Id. at 105-06 (emphasis in original).³

Were we to follow *Trailways*, its holding would control our decision in this case. The grievance chairmen cannot be considered current employees of Caterpillar who are being compensated for their current services. The chairmen perform no services directly for Caterpillar. Instead, they handle grievances and other labor matters for the union, a situation that often places them in a position adverse to Caterpillar's. Section 302(c)(1) legalizes payments to current or former employees based on their "services" as employees, not their "status" as such. Thus, the mere fact that the chairmen remain on the Caterpillar payroll and fill out the appropriate forms and time sheets to get paid is legally irrelevant.

The union argues that, unlike the situation under subsection (c)(5) in *Trailways*, under subsection (c)(1) the chairmen can be employees of both the union and the employer. It relies especially on *NLRB v. Town & Country Electric*, 116 S. Ct. 450, 456 (1995), in which the Supreme Court held that a paid union organizer who obtained a job in order to "salt" the workforce and organize for the union was still an employee within the meaning of the National Labor Relations Act. But there, the Court noted that the employee still performed services for the benefit and under the control of the employer, even though part of his time was spent organizing for the union. That situation is different from ours. Here the chairmen do nothing for Caterpillar's benefit.

Moreover, under *Trailways* we cannot conclude that the chairmen's salaries were payments to former employees "as compensation for" their past services as employees. The chairmen were already compensated for their production line work long

³ In a footnote, the court noted that the pension contributions were based on the employees' current union salary, indicating that the payments were "geared to their contemporaneous services to the Union." *Id.* at 106 n.5 (emphasis deleted).

ago in the form of wages and vested benefits. A fair reading of *Trailways* does not support a finding that the payments at issue here somehow "related back" to these former employees' services on the factory floor.

B.

Nevertheless, after careful consideration and reargument before the *in banc* court, we believe that *Trailways* was wrongly decided and tends to subject innocuous, bargained-for and fully disclosed payments to the criminal sanctions of the LMRA.

We have no difficulty with the *Trailways* holding regarding "current employee" status. See 785 F.2d at 106-07. We also believe that the salary payments to these union officials were not in compensation for their past services rendered as production employees. Our disagreement is with the *Trailways* court's conclusion that the "by reason of" language in § 302(c)(1) exempts only those payments for past services actually rendered while the former employee was still employed by the company. We think that statement misinterprets the text of § 302(c)(1) and does nothing to further the policy objectives Congress had when it enacted the LMRA half a century ago.

The *Trailways* test would be quite appropriate if § 302(c)(1) referred only to payments as *compensation* for past services. It is difficult indeed to comprehend how years, even decades, of paid union leave can realistically be thought of as compensation for time spent on the factory floor. The *Trailways* court, however, applied the same test to the statute's "by reason of" language; with that we can no longer agree.

First of all, Congress chose specifically to exempt payments in "compensation for" or "by reason of" an employee's service. By so doing, it must be presumed to have intended that certain payments would be legal, even though they were not, as *Trailways* recites, "for past services actually rendered by those former employees while they were employees of the company." *Id.* at 106 (emphasis deleted). Nevertheless, the *Trailways* court, without any explanation, conflated the two phrases and developed a

unitary test for whether former employee compensation is permissible.

Under the *Trailways* test, there are three requirements for a "former employee" payment to qualify for the § 302(c)(1) exemption:

- (1) It must be for past, not present, services;
- (2) the services must be actually rendered; and
- (3) the services must have been rendered while the payee was still an employee.

Under this standard, the chairmen's wages fail the *Trailways* test, because the payments are not for services actually rendered to the company while they were still employees. Indeed, under *Trailways*, it appears that pay or continuation of benefits for time spent serving on a jury or in the National Guard would be illegal.

Likewise, even the "no docking" provisions of many collective bargaining agreements, including the Caterpillar-UAW contract here, fail to meet the *Trailways* standard. Under a no-docking clause, the employer agrees that shop stewards may leave their assigned work areas for portions of a day to process employee grievances without loss of pay. By paying production workers for the part-time hours when they leave their regular duties, the company is paying for services not actually rendered for it, since those employees are already receiving their regular hourly wages and benefits for their production line work. Yet, no-docking arrangements have been consistently upheld by the courts as not in violation of § 302, see *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); *Herrera v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970), and Caterpillar does not even seek to have the contract's no-docking clause declared illegal. Moreover, as the

union points out, it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime.

We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself. Caterpillar was willing to put that costly benefit on the table, which strongly implies that the employees had to give up something in the bargaining process that they otherwise could have received. Thus, every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.⁴ As our colleague Judge Becker pointed out, dissenting in *Trailways*:

The collective bargaining agreement contains the terms of workers' employment with Trailways; each of the benefits the workers receive under that collective bargaining agreement are part of the consideration for their services at Trailways. In addition to the standard terms for wages, overtime pay, and insurance, the collective bargaining agreement provides that persons who take a leave of absence to work as union officials have a right to reinstatement at Trailways after their union service and retain their seniority during their absence. The collective bargaining agreement also provides that the employer will make payments into the union's pension fund while the employee is on leave. Although these contributions are made during the leaves of absence,

⁴ We do not mean to imply that an employee hired after a collective bargaining agreement could not be elected chairperson because he or she never "agreed" to an implicit wage reduction. Rather, like any other term of a labor agreement, it would be binding on all employees, whenever hired, until the expiration of the contract.

the employer's promise to pay them is nonetheless a term of the collective bargaining agreement and therefore a part of the consideration for work performed as a Trailways employee. There is no reason for distinguishing the pension fund payments from any of the other terms of the collective bargaining agreement. Like wages, overtime, insurance, or accrued seniority, the pension fund payments are consideration for services rendered and, as such, are permissible under § 302(c)(1).

Trailways, 785 F.2d at 109 (Becker, J., dissenting).

We find this line of reasoning persuasive. Indeed, it has been taken by a number of decisions reached after *Trailways*. See *United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) (§ 302(c)(1) satisfied when former employee's entitlement to payments vests *before* he or she goes out on leave, but not after); *Toth v. USX Corp.*, 883 F.2d 1297, 1301-04 (7th Cir. 1989) (criticizing *Trailways* and opining that "[o]ne obvious instance in which continuing payments constitute recompense for past services is when those continuing payments were bargained for and formed part of a collective bargaining agreement."); *IBEW v. National Fuel Gas Dist. Corp.*, 16 Employee Benefits Cases 2018, 2020-21 (W.D.N.Y. 1993) (same); *Bell Atlantic*, 670 F. Supp. at 421-22 (same). We are aware of no currently valid opinion that follows the *Trailways* holding.

Caterpillar maintains that, under the reasoning we have utilized, employers and unions can themselves decide what is legal regardless of federal law by agreeing in a labor contract to a particular course of conduct. Our point, however, is not that a collective bargaining agreement can immunize unlawful conduct, but that: (1) under § 302(c)(1), the lawfulness of the conduct *ab initio* turns on whether the payment is "owed because of . . . service as an employee"; and (2) what is "owed" depends on the terms of the contract. Put differently, the contract does not immunize otherwise unlawful subjects but, by defining the basis for the payments, speaks directly to the question posed by the statute

as to whether the payments are "compensation for, or by reason of . . . service as an employee."

We also believe that any attempt to distinguish "no docking" provisions from the payments at issue here is unpersuasive. We perceive no distinction between union officials who spend part of their time (which may be quite substantial) in adjusting grievances from the type of employees who are involved here. Instead, "the nature of the absences and the payments made by the employer owning them is the same." *Trailways*, 785 F.2d at 111.

III.

In sum, we simply do not view the payments at issue here as posing the kind of harm to the collective bargaining process that Congress contemplated when it enacted the LMRA. Section 302 of that statute was passed to address bribery, extortion and other corrupt practices conducted in secret. *See Trailways*, 785 F.2d at 110 (Becker, J., dissenting). These expanded "no-docking" provisions, in contrast, are contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote. Thus, the officials receiving the payments can be held accountable to the membership. *See Toth*, 883 F.2d at 1304. Without explicit statutory direction from Congress, we cannot condemn these payments as criminal. Accordingly, we will reverse.

MANSMANN, *Circuit Judge*, dissenting, with whom Judge GREENBERG joins.

In suggesting that "innocuous, bargained for and fully disclosed payments" from an employer to an employee representative should be lawful, the majority has placed its own policy objectives above plain language. By its own terms, the "by reason of" exception of 29 U.S.C. § 186(c)(1) simply does not include payments made to an employee representative merely because the payment is included in a collective bargaining agreement and the representative worked for the employer at one time. The plain language of the section 186(c)(1) exception is supported by the

legislative history and purpose of the exception, and the majority's conclusion is at odds with important federal policy. Because I believe that the payments at issue in this case do not fall within the exception of section 186(c)(1), I respectfully dissent.

I.

Where statutory language is plain, we must enforce that language according to its terms. *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 108 (3d Cir. 1996); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989); *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, ___ F.3d ___, ___, 1996 WL 708610, at *5 (3d Cir. Dec. 10, 1996) (unless literal application will produce absurd result, plain meaning is conclusive). It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490, 67 S. Ct. 789, 792, 91 L. Ed. 1040 (1947).

Section 302(a) of the LMRA, 29 U.S.C. § 186(a), on its face, makes it unlawful for any employer to pay any money or thing of value to any representative of its employees. As the majority recognizes, section 302(a), standing alone, prohibits the payments at issue in this case. *Maj. Op.*, at 4-5.

Section 302(a) contains several exceptions. Section 302(c)(1), 29 U.S.C. § 186(c)(1), renders section 302(a) inapplicable in respect to any money or other thing of value payable by an employer "to any representative of his employees, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer."

The majority concedes that the payments at issue in this case are not payments to a current or former employee "as compensation for . . . his services." *Maj. Op.*, at 7. The sole issue, then, is whether the payments to a former employee, who presently works as a grievance chairperson for the union, are made "by reason of . . . his services as an employee of such employer."

Contrary to the position of the majority, I must conclude that the language of section 302(c)(1) is plain and does not encompass the payments at issue here.

The "by reason of" exception of section 302(c)(1) simply recognizes that current and former employees might have a right to receive payments from their employers that arise from their services for their employers but that are not properly classified as "compensation." The "by reason of" exception includes pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. See *United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay, and pension benefits"), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1312, 131 L. Ed. 2d 194 (1995); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, AFL-CIO*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits, and the like"); see also *Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994, 110 S. Ct. 544, 107 L. Ed. 2d 541 (1989). Although not properly called compensation, "by reason of" payments "arise from" the employee's services for the employer.

Without the section 302(c)(1) exception, these payments would be illegal if paid to any employee or former employee who also worked for the union. Thus, an employee who worked full time for the company, but who held a part-time position with the union (a practice permitted by the Supreme Court's decision in *NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995)), would be unable to be paid his salary and could not receive fringe benefits—despite working full time. Section 302(c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service for the

union; the exception allows union representatives to receive payments *in spite of* their current service for the union.

The key, however, is that the employee must receive the compensation or other payment because of his or her service for the employer. See, e.g., *Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"); *id.* (under plain meaning of exception, "payment given to former employee must be for services he rendered while he was an employee"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work"); *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for union, not employer, are unlawful). The payments at issue in this case are entirely unrelated to the representatives' services for the employer. I believe that the plain language of the section 302(c)(1) exception does not encompass the payments at issue here and that we must affirm the judgment of the district court.¹

¹ The majority overstates the effect of our decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932, 107 S. Ct. 403, 93 L. Ed. 2d 356 (1986).

Section 302(c)(1) states that all payments made to union representatives—whether they are in direct compensation for services (wages) or merely by reason of those services (vacation pay, jury pay, et cetera)—must somehow relate to those individuals' services for the employer. The *Trailways* opinion did not merge "compensation for" and "by reason of" as the majority suggests; it does not dispute the fact that "compensation for" and "by reason of" complement each other and that the "by reason of" exception covers certain payments that are not truly compensation. Instead, in *Trailways* we recognized that certain payments to former employees may no longer be justified once the individual stops performing services for the employer.

II.

Because the plain language of the "by reason of" exception of section 302(c)(1) does not contemplate the payments at issue here, I would affirm the judgment of the district court without further discussion. Nonetheless, as I now digress briefly to relate, the legislative history and the purpose of section 302 support my conclusion that the payments at issue are unlawful.

As the majority recognizes, section 302 is a conflict-of-interest statute that is designed to eliminate practices that have the potential for corrupting the labor movement. *Maj. Op.*, at 11; see *Phillips*, 19 F.3d at 1574. As the majority also recognizes, Congress was concerned about, *inter alia*, bribery and other secret, back-room agreements between employers and employee representatives. See *Toth*, 883 F.2d at 1300.

The majority does not go far enough, however. Recognizing that "any person in a position of trust" must not "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," Congress stated that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong. 1st Sess., reprinted in 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organizations).² Congress desired to close

This makes sense. For example, it is apparent that jury-duty pay is "by reason of" an employee's services to the employer. It would be strange indeed if a former employee who retired five years ago could demand to be paid by the employer for his upcoming jury duty. As *Trailways* recognizes, payments to former employees, whether as compensation for or by reason of their former services, must be related to that former service. Just as former employees are no longer entitled to "by reason of" pay such as jury-duty pay, they should not be entitled to payments for performance of union work that is entirely unrelated to their former service. Accordingly, I see no reason to reverse our decision in *Trailways*.

- 2 I rely on the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 (an act that strengthened section 302), instead of the official history of the Labor Management Relations Act of 1947 (the

the loopholes "which both employer representatives and union officials turned to advantage at the expense of employees." *Id.* at 2330.

When he introduced section 302 in 1947, Senator Ball expressed a concern that even negotiated payments from employers might "degenerate into bribes." 93 Cong. Rec. 4805 (1947), reprinted in II NLRB Legislative History of the Labor Management Relations Act, 1947, at 1305 (1948) (discussing welfare funds). Senator Ball stated that absent section 302, "there is a very grave danger that the funds will be used for the personal gain of union leaders." *Id.* Senator Byrd echoed the concerns of Senator Ball, noting that funds from the employer should not be "paid into the treasuries of the labor unions." *Id.* According to Senator Pepper, unless authorized in writing by each individual employee (in the form of dues check-off), "union leaders should not be permitted . . . to direct funds paid by the company . . . to the union treasury or union officers." *Id.* (quoting committee report).

Section 302 therefore exists to prohibit "all forms of extortion and bribery in labor-management relations." *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1053 (emphasis supplied) (quoting S. Rep. No. 187, 86th Cong. 1st Sess. 13, reprinted in 1959 U.S.C.C.A.N. 2318, 2329). Congress was concerned with corruption through both (1) bribery of employee representatives by employers and (2) extortion by those representatives. *Toth*, 883 F.2d at 1300 (citing legislative history and cases). Congress explained:

The national labor policy is founded upon collective bargaining through strong and vigorous unions. Playing both sides of the street, using union office for

act that contained section 302), because the Congressional Comments to the Labor Management Relations Act do not include a discussion of the provisions at issue here. See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67, reprinted in 1947 U.S.C.C.A.N. 1135, 1173. In the text, I include the comments of three senators made prior to the passage of section 302 that were not included in the official conference report.

personal financial advantage, undercover deals, and other conflicts of interest corrupt, and thereby undermine and weaken the labor movement The Government . . . must make sure that the power [to act as exclusive bargaining representative] is used for the benefit of workers and not for personal profit.

S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2331.

Thus, Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management. The payments at issue in this case do exactly that. They create a conflict of interest for union negotiators who may agree to reduced benefits for the employees in exchange for financial support for the union.

For example, let us assume that ABC Corporation and the union are engaged in difficult negotiations over a pension plan. Also assume that the employer was stonewalling on this issue, that the union had the "correct" position, and that the company could have accepted the union's proposal without suffering noticeable financial impact. Assume ABC said to the union negotiator: "I know your local is having financial trouble. We will pay the salaries of the grievance chairmen if you stop pushing for this pension plan." The negotiator, who knows that her local can no longer pay the full salaries of all the grievance chairmen, agrees, and the pension plan is dropped in favor of the financial security of the union. The agreement is included in the bargaining agreement, and both the union and ABC effectively "sell" the agreement to the employees, who ratify it (not aware that the pension plan was sacrificed in this way). According to the majority, this scenario is perfectly lawful because it was included in the agreement. According to the language, legislative history and purpose of section 302, however, this scenario represents just what Congress sought to avoid.

III.

As the majority concedes, the grievance chairmen in this case do not perform *any* services *whatsoever* for Caterpillar. Maj. Op., at 6. Instead, the chairmen perform services exclusively for the union. The majority concludes, however, that payments to such union employees are "by reason of" the employees' services to the employer. First, the majority reasons that such payments were negotiated and appear in the collective bargaining agreement. Second, the majority states that, because each employee must "give up something" in negotiations with the employer so that these payments may be included in the agreement, such payments are somehow "by reason of" the employees' service for the employer. Finally, the majority contends that the payments at issue in this case are no different than so-called "no-docking" payments made to current employees who process employee grievances during working hours. I do not believe that the majority's reasoning withstands scrutiny.

The majority first relies on the fact that the payments were negotiated and included in the collective bargaining agreement. Maj. Op., at 9-11. Simply including a payment provision in a collective bargaining agreement does not, however, make the payment "by reason of" an employee's prior service.

Section 302(a)(1) provides that it shall be unlawful for any employer to "agree to pay" any money to any representative of any of his employees. 29 U.S.C. § 186(a)(1). Thus, actual payments to union representatives are prohibited, but so are *agreements to pay* union representatives. The majority places special emphasis on the fact that the payments in this case were negotiated and were not, in effect, secret agreements. Congress, on the other hand, was not concerned about the secrecy of these agreements. If an agreement to pay is unlawful under section 302(a)(1), it is illogical to use that same agreement as a basis for finding that the resultant payment is lawful under section 302(c)(1). Congress could easily have written an exception for payments by employers to union representatives pursuant to a collective bargaining agreement. Instead, Congress limited its

section 302(c)(1) exception to payments in compensation for or by reason of a representative's services for the employer.³

The majority does not find support in the statute (and indeed there is none) for its conclusion that bargained-for payments should be any more legal than secret agreements. Without support, the majority asserts that an open agreement makes a payment "by reason of" services for the employer. In so doing, the majority expands the exception such that the rule is rendered a nullity.⁴

The majority next reasons that since current employees must surely "give up something" during negotiations in exchange for an agreement by the employer to pay former employees to perform union work, then those payments must be "by reason of" their services. Maj. Op., at 9. The majority contends that "the employees had to give up something in the bargaining process that they otherwise could have received . . . in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." *Id.*

Under the majority's reasoning, the union and the company could also agree to have the employer pay the salary of the in-

3 Senator Ball stated that the section 302(c)(1) exception allows payment of "money due a representative who is an employee or a former employee of the employer, *on account of wages actually earned by him.*" 93 Cong. Rec. 4805 (1947), reprinted in II NLRB Legislative History of the Labor Management Relations Act, 1947, at 1304 (1948) (emphasis supplied). It is apparent that Senator Ball did not contemplate that the narrow exception of section 302(c)(1) would someday encompass payments to a former employee that are entirely unrelated to the employee's services.

4 I am also concerned that by placing so much emphasis on the fact that the payments were negotiated and included in the collective bargaining agreement, the majority effectively permits employers and unions to negotiate over otherwise unlawful subjects of bargaining. It is beyond dispute that employers and unions cannot bargain over illegal subjects of bargaining. Nonetheless, the majority uses the bargaining process to legitimize a payment that is otherwise prohibited by statute.

ternational union's president and subsidize the pension fund of the union's permanent staff—all because the company's employees might "give up something" during negotiations in the hopes that they too might someday receive those payments if elected to serve the union in the proper capacity. In deciding that "giv[ing] up something" is sufficient to bring the payments at issue in this case within the "by reason of" exception contained in section 302(c)(1), the majority has embarked on a slippery slope that will legitimize virtually any type of payment from the employer to the union so long as the payment is negotiated and included in the collective bargaining agreement.

The majority's reasoning violates the plain language of section 302(c)(1) in yet another way. This section allows an employer to make payments to *a* current or former employee by reason of "*his*" services as an employee. 29 U.S.C. § 186(c)(1). The majority reasons that the payments at issue in this case are lawful by reason of all of the employees' *collective* service. This is contrary to the plain meaning of the statute. If a union official is to be paid by the employer, it must be by reason of *that official's* service to the employer—not because of the service of others who might aspire to his position. Indeed, if the collective bargaining agreement allowed, but did not require, that the grievance chairperson be a former employee of the company, then the company might find itself paying an individual who was never an employee of the company by reason of *other employees'* services for the company—a result clearly not permitted by section 302(c)(1). By relying on the collective service of the employees, the majority ignores the plain language of the statute.

I also fear that the majority's reasoning could be construed to apply to several situations which would defy logic. For example, let us assume that an individual applies for (and obtains) a job with the employer. One day after beginning work, the individual is elected grievance chairperson. For the next thirty years,⁵

5 While the agreement in this case may contain a time restriction, that restriction did not play any part in the majority's reasoning. Therefore, I presume that an agreement that does not contain a time restriction will not be unlawful under the majority's decision.

the individual serves as grievance chairperson and performs no services for the employer. Thus, the individual performed eight hours' worth of services for the employer, but was paid by the employer for thirty years. The majority's claim that this individual is being paid for thirty years "by reason of" his one-day service for the employer is illogical.

In another example, let us assume that two grievance chairpersons are elected on the same day. One ("Michael") worked for the employer for twenty years. The other ("Mary") was active in the union but never worked for the employer. Under the collective bargaining agreement in this case, the employer is required to pay Michael, but is prohibited from paying Mary. At present, both Michael and Mary perform exactly the same services, but Michael's prior employment (for which he was already fully compensated) entitles him to continued payment from the employer.⁶

The majority's reasoning also fails as a matter of logic in "open shops." In an open shop, not all employees governed by the collective bargaining agreement will necessarily be members of the union. An employee who is not a member of the union (and who therefore cannot aspire to become a grievance chairperson) will nonetheless be forced to endure a lower salary or reduced benefits due to his co-workers' decision to "give up something." In addition, unions will be able to circumvent the problems that arise when some employees elect not to join the union or pay union dues—they will seek agreements from the employer to subsidize representatives' salaries in exchange for reductions in pay or benefits. These agreements will be negotiated

⁶ Altering this example somewhat, let us assume that Michael worked for twenty years before being elected grievance chairperson, but that Mary worked one day. In this situation, the employer would be required to pay both Michael and Mary. Michael, however, "gave up" significantly more than Mary, as Michael worked for twenty years at reduced wages, while Mary only worked one day. The employer does not take into account what each individual gave up—the employer considers what the collective group gave up. I contend that the employer may not do that under the plain terms of section 302(c)(1).

and ratified without the input of the non-union employees. Thus, an employee who elects not to pay union dues may nonetheless face reductions in salary or benefits so that the union (which he or she does not support) may prosper. The payments at issue here are surely not "by reason of" the nonunion employees' services—yet those same payments are made possible by the non-union employees' reduced salary and benefits.

IV.

Finally, the majority contends that since no-docking provisions are lawful under section 302, the payments at issue here should also be lawful. The majority writes that "it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime." Maj. Op., at 9.

In reasoning that the payments at issue here are analogous to no-docking payments, the majority assumes (without deciding) that no-docking provisions are lawful. While some courts have so held, we have not yet addressed the lawfulness of no-docking payments. Until we do so (and until we explain our reasons for finding such payments lawful), the majority should not analogize such payments to those at issue here.

Assuming that no-docking provisions are lawful, however, we are still not required to reach the conclusion that the payments at issue in this case must also be lawful. Indeed, there are substantial differences between no-docking payments and the payments at issue here. The primary difference is that no-docking payments are made to individuals who are current employees of the company currently performing services for the company. In contrast, the payments at issue here are made to *former* employees of the company not performing any services for the company.

In *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046, the Second Circuit observed that payments made to current employees for short absences (such as vacation pay, sick pay, or military leave pay) are all made to current employees "by reason

of" their current, ongoing services for their employer. The court then reasoned that payment to current employees for short absences to perform union work is no different from vacation pay, sick pay, and military leave pay. *Id.* at 1049. Thus, no-docking payments made to current employees who occasionally performed union work during working hours should be treated the same as other payments for short term absences.

Importantly, the court recognized that each of these payments were made to persons whose entitlement to the payments was "by reason of" *current service*. As the court noted, "no-docking provisions have relevance only to persons who are currently serving as employees." *Id.* at 1049 n.1. The common element linking sick pay and no-docking pay "is simply that the person to whom the employer makes payment is one who performs services as an employee." *Id.* at 1049 (footnote omitted). If we assume that no-docking payments are analogous to sick pay, we must conclude that they can only be made to current employees who perform services to their employers. This makes sense—former employees do not accrue sick pay or vacation pay. Likewise, they should not accrue "union-work-time pay." *See also Phillips*, 19 F.3d at 1575 n. 18 (recognizing difference between no-docking provision and payments to non-employees who perform no work for company).

The majority cites several cases from our sister courts of appeals where courts concluded that no-docking provisions are lawful. In several of those cases, however, the courts carefully distinguished no-docking payments from payments made to union officials who did not perform work for the company. In *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, AFL-CIO*, 791 F.2d 1046 (2d Cir. 1986), for example, the court stated:

[W]e do not suggest that section [302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work. . . . [A] union official who, though on an employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception.

Id. at 1050. In another case cited by the majority, the court agreed that payments to a union official put on an employee payroll but not assigned any meaningful work would violate section 302. *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986).

The majority also cites *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994, 110 S. Ct. 544, 107 L. Ed. 2d 541 (1989). There the court of appeals stated:

At some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments "in compensation for or by reason of" that employment

Id. at 1305. As an example of a case that would violate section 302, the court stated that "fulltime pay for no service cannot reasonably be said to be compensation 'by reason of' service as an employee." *Id.* (citing *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1050).

Indeed, the distinction between no-docking payments and the payments at issue here is reinforced elsewhere in the labor laws. For example, 29 U.S.C. § 158(a)(2) provides that it shall be an unfair labor practice for an employer to contribute financial support to any labor organization. This rule contains one exception: "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." *Id.* Thus, while employers may allow employees to confer with their employer during working hours without loss of pay, the employer may not contribute financial support to the labor organization. The rule bans the payments at issue here; the exception allows no-docking provisions.

Other realities dictate that no-docking payments are simply not analogous to the payments at issue here. For example, employees subject to no-docking payments are more likely to do union work on an "as needed" basis. They are also more likely to be able to schedule grievance meetings and other union work

at the mutual convenience of the employees and the employer. In contrast, the grievance chairmen in this case are paid full time regardless of whether there is any union work to be done. They are never available to perform services for the employer. Thus, the four individuals who spend two hours per day performing union work (from the majority's hypothetical) are less of a burden for the employer than one employee's absence all day every day.

V.

While the majority emphasizes its policy determination that bargained-for payments should not be unlawful, it does not discuss several compelling policy reasons why we should affirm the judgment of the district court. These policy considerations go far beyond the need to avoid conflict of interest among union negotiators, a policy that is clear on the face of the statute and in the legislative history.

Initially, as the majority recognizes, the grievance chairperson will often take a position at odds with the position of management. Maj. Op., at 6-7. Indeed, the grievance chairperson is most needed when the employee's position is adverse to the employer's. In order to be effective, the grievance chairperson often will fight zealously for the aggrieved employee and against the employer. Meanwhile, the employer must pay the chairperson's salary. It seems illogical to me to force the employer to pay the salary of an individual whose sole function is to oppose the employer.⁷

⁷ I recognize that the word "force" may be strong since the employer need not agree to pay the grievance chairperson during negotiations. Assuming that this pay practice is not unlawful, however, the practice undoubtedly constitutes a mandatory subject of bargaining. *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 852-54 (5th Cir. 1986). Thus, if the employer refused to accede to such a pay provision, the employees could strike over this issue.

Indeed, those employees who may have the most influence in swaying other employees' opinions regarding strike decisions are probably the same individuals who are most likely to be elected to the position of grievance chairmen. I envision the situation where an employee who seeks

Next, by sanctioning an agreement whereby the company pays grievance chairmen to perform services for the union, the majority unnecessarily creates uncertainty over whether the chairmen are employees of the union or employees of the company. In *NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995), the Supreme Court addressed the question of who is an employee under the NLRA. The Court favorably cited several common definitions of "employee"—including "person in the service of another . . . where the employer has the power or right to control and direct the employee" *Id.* at ___, 116 S. Ct. at 454 (citation omitted). Under this definition, a grievance chairperson appears to be an employee of the union. Citing an excerpt from the NLRA's legislative history, however, the Court noted that "employee" includes "every man on a payroll." *Id.* at ___, 116 S. Ct. at 454 (citation omitted). Since grievance chairmen remain on the company's payroll, perhaps they remain employees of the company. The majority does not decide whether the company or the union is the chairmen's employer.⁸

the position of grievance chairperson may seek to insure that his or her desired position is fully funded by the employer before he or she accepts the position—even if that means encouraging a strike. Even the possibility that this might occur demonstrates the conflict of interest that will surely arise among those individuals who may seek the funded positions.

⁸ This uncertainty will extend beyond cases arising under the NLRA. The Supreme Court recently held that, under Title VII of the Civil Rights Act of 1964, the test for deciding whether an employer "has" a particular employee is whether the employer has "an employment relationship" with the individual. *Walters v. Metropolitan Educ. Enters., Inc.*, ___ U.S. ___, 117 S. Ct. 660, ___ (1997). The Court noted, however, that "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *Id.* at ___, 117 S. Ct. at ___; see also Equal Employment Opportunity Commission Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees Are Employees (Apr. 1990), at 24, reprinted in 3 EEOC Compl. Man. (BNA), at N:3311 (interpreting both Title VII and ADEA; while one's status as an employee is defined by examining the employment relationship, "[t]he payroll is a reliable indicator of those individuals who have an employment relationship with the employer and therefore are employees"). While grievance

The failure of the majority to decide whether the grievance chairmen are employees of the union or the employer may lead to numerous problems: Is a grievance chairperson considered part of the bargaining unit while on leave? Who will be liable if a grievance chairperson injures a third party while performing union work? Who will be responsible for providing a reasonable accommodation to a grievance chairperson with a disability who needs assistance performing her union job on the employer's premises? What if a grievance chairperson decides to take FMLA leave—will his eligibility depend on whether the union is an FMLA employer or whether the company is an FMLA employer?⁹ If a grievance chairperson is injured while performing union duties, will she nevertheless be entitled to disability or workers' compensation from the company? May the company terminate, suspend or discipline a grievance chairperson if he engages in activity that would qualify for termination, suspension or discipline for other employees? These questions are admittedly outside the scope of the narrow issue before us, but the majority's

chairmen have an employment relationship with the union (indicating that the employer is the union), their relationship with the company is not completely severed, and they continue to appear on the company's payroll (indicating that the employer is the company).

I would note also that this is not a traditional dual-employer case where both the union and the company may be considered employers of the grievance chairmen. In the traditional dual-employer case, the individual performs services for both the company and the union and is paid by both the company and the union for the services performed for the respective payor. In this case, in contrast, the individuals perform services exclusively for one entity and are paid exclusively by another.

- 9 The Senate Report accompanying the Family and Medical Leave Act of 1993 states that the term "employ" means "maintain on the payroll." S.Rep. No. 103-3, 103d Cong. 1st Sess. 22, reprinted in 1993 U.S.C.C.A.N. 3, 24 (individuals on leaves of absence are considered employees "so long as they are on the employer's payroll."). It would seem, therefore, that grievance chairmen are employees of the company for purposes of the FMLA. The Report also states, however, that Congress desired that "employ" under the FMLA mean the same as "employ" under Title VII. As noted *supra* note 8, it is not clear whether the union or the company employs grievance chairmen for the purposes of Title VII.

decision will assuredly lead to innumerable disputes about the proper classification of individuals who remain on the company's payroll without performing any services for the company. If we affirm the judgment of the district court, however, it is clear that individuals who leave the company to work for the union are union employees, and the above questions resolve themselves.

The final and most important policy consideration not addressed by the majority is that federal labor policy demands that labor organizations and employers remain separate and distinct from one another. The majority would sanction a pay practice that violates this important policy.

By enacting the labor laws as written, Congress insisted that the NLRB and the courts observe a sharp line between management and labor. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 192-93, 102 S. Ct. 216, 230, 70 L. Ed. 2d 323 (1981) (Powell, J., concurring in part and dissenting in part). Indeed, the dividing line between management and labor is "fundamental to the industrial philosophy of the labor laws in this country." *Id.* at 193, 102 S. Ct. at 230; see also *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 284-85 n.13, 94 S. Ct. 1757, 1767 n.13, 40 L. Ed. 2d 134 (1974) (recognizing "traditional distinction between labor and management"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494-95, 67 S. Ct. 789, 794-95, 91 L. Ed. 1040 (1947) (Douglas, J., dissenting) ("industrial philosophy" recognizes that management and labor are "basic opposing forces"); *Cedars-Sinai Medical Center v. Cedars-Sinai Housestaff Assoc.*, 223 NLRB 251, 254 (1976) (Fanning, member, dissenting) ("underlying Federal labor policy . . . seeks to draw a line between labor and management"). Congress' desire to preserve the distinction between labor and management is evinced throughout the labor laws. See, e.g., 29 U.S.C. § 158(a). I believe that allowing an employer to provide financial support to a union, as the majority does here, blurs the important line between labor and management and creates the potential for conflict that our labor laws do not tolerate.

VI.

I recognize that labor organizations and employers have begun to embrace a more cooperative method of negotiating and dispute resolution, and I applaud labor-management efforts to retreat from the adversarial approach that has often marred the labor landscape in this country. I believe, however, that the payments sanctioned by the majority go too far. The financial support sought by the United Auto Workers in this case contravenes the longstanding tradition of separation of labor and management. I accept and encourage arm's length cooperation between labor and management. I cannot condone payments that threaten the independence of labor, create conflicts of interest for union negotiators, and violate the plain language of our laws. It is for Congress, not the courts, to determine if and when to permit labor organizations and employers to blur the line between them.

Accordingly, I respectfully dissent.

ALITO, Circuit Judge, dissenting:

If I were a legislator, I would not vote to criminalize the payments to grievance chairmen that are at issue here. I agree with the majority that these payments differ from the corrupt practices that usually figure in prosecutions under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Moreover, I am not certain that the Congress that enacted Section 302 would have chosen to outlaw such payments if it had focused specifically on that question.

Our job, however, is to interpret Section 302 as it is written. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, the majority has not heeded the plain meaning of Section 302 and has not shown that the literal application of the statutory language would lead to a result

that is "demonstrably at odds" with congressional intent. I therefore dissent.

As the majority acknowledges, Section 302 prohibits Caterpillar from paying the grievance chairmen unless those payments fall within one of the exceptions set out in Section 302(c), 29 U.S.C. § 186(c). *See* Maj. Op. at 4-5. The exception at issue here is that contained in subsection (c)(1), which applies to "any money or other thing of value payable by an employer . . . to any representative of his employees, . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). The union argues that these payments fall within this exception for three separate reasons: (1) they are compensation for the grievance chairmen's current service as Caterpillar employees; (2) they are compensation for the grievance chairmen's former service as Caterpillar employees; and (3) they are made "by reason of" the grievance chairmen's former service as Caterpillar employees. I briefly discuss each of these theories below.

I.

*"As Compensation For" Current Service
as a Caterpillar Employee*

Although the union's primary arguments appear to be that the payments are made "as compensation for" or "by reason of" the grievance chairmen's past service as regular Caterpillar employees, the union also maintains that these payments are legal because they may be viewed "as compensation for" the grievance chairmen's work as current Caterpillar employees. The union contends that the grievance chairmen, who are officially on leaves of absence from Caterpillar, are joint employees of Caterpillar and the union. Among other things, the union notes that Section 302(c)(1) seems to contemplate such joint employment, since it permits an employer, under certain circumstances, to make payments to "any representative of his employees . . . who is also an employee . . . of such employer." And the union argues that under

National Labor Relations Board decisions the grievance chairmen qualify as joint employees.

I find it unnecessary to reach the question whether the grievance chairmen may be considered joint employees. Assuming that they are, I am convinced that Caterpillar's payments to them are not made "as compensation for" their service as current Caterpillar employees. In their capacity as grievance chairmen, they owe their complete loyalty to the workers they represent. See Dist. Ct. Op. at 14-15. They plainly work for the union and not for Caterpillar, and as the majority notes, their representation of the workers "often places them in a position adverse to Caterpillar's." Maj. Op. at 6-7.¹

It is noteworthy that the union's excellent brief, while arguing strenuously that the chairmen are joint employees, makes little effort to show that the pay and benefits they receive are compensation for services performed for Caterpillar. The union's brief merely states:

Caterpillar . . . realizes substantial benefit from the chairman's work. As the record shows, the chairman's job . . . is "to make sure that contract works" and if he succeeds, "everyone benefits—the workers, the Company and its production needs, and the Union." App. 260.

Appellant's Br. at 48.

This argument seems to me to obliterate the distinction, which is surely significant in the real world, between services performed for an employer and services performed for a union. I do not question the proposition that "everyone benefits" if the contract works; nor do I question the proposition that the grievance chairmen can help to make the contract work; but I do not think that it follows that the work that they do should be regarded

¹ I note that the union's brief acknowledges that "the Union certainly exercises primary control over the chairman and derives the primary benefit from his work." Appellant's Br. at 45.

under Section 302(c)(1) as services performed for Caterpillar. By this reasoning, everyone who helps to make the contract work, including presumably the union officers, could be viewed as working for Caterpillar. And since the union, as well as Caterpillar, benefits when the contract works, everyone who helps to make the contract work, including Caterpillar officers and supervisors, could be viewed as working for the union. Thus, the union's logic leads to preposterous results. Therefore, regardless of whether or not the chairmen may be technically considered to be joint employees of both Caterpillar and the union, I reject the argument that the payments in question here can be permitted on the theory that they constitute payments made to the chairmen "as compensation for" current services performed by them for Caterpillar. See Dist Ct. Op. at 16 n.14 (because chairmen perform no functions on behalf of Caterpillar, payments are not for services rendered by chairmen to Caterpillar whether or not they can be considered current Caterpillar employees).

II.

"As Compensation For" Past Service as a Caterpillar Employee

I agree with the majority that the payments made to a grievance chairman do not constitute "compensation for . . . his service" as a company employee prior to his selection for a grievance position. This point can be demonstrated by considering the following situation. Suppose that an employee works for a number of years in a certain job category and receives during that period the same wages and other benefits as all the other employees in the same job category with the same seniority. Suppose that the employee is then selected to serve as a grievance chairman, and that he then entirely ceases his prior work and devotes his full time to grievance work, but continues to receive wages and benefits from the employer. It is plain that the wages and benefits that this employee receives after becoming a grievance chairman are compensation for his grievance work, not for the work that he did prior to his selection as a grievance chairman. If these payments were compensation for his prior work, then his com-

pensation for that work would exceed that of the other employees with equal seniority who had labored in the same job category. Moreover, if the payments were compensation for previously completed work (in other words, if the payments had been fully earned before the employee's selection as a grievance chairman), the employee would presumably be entitled to receive those payments if, instead of serving as a grievance chairman, he went fishing. But of course that is not the case.

Accordingly, I agree with the majority that the payments at issue here are not compensation for a grievance chairman's work prior to his selection for that position. As the majority states: "[t]he chairmen were already compensated for their production line work long ago in the form of wages and vested benefits." Maj. Op. at 7. "It is difficult indeed to comprehend how years, even decades, of paid union leave can realistically be thought of as compensation for time spent on the factory floor." Maj. Op. at 8.

III.

"By Reason Of" Past Service as a Caterpillar Employee

While the majority holds that the payments to the grievance chairmen are not "compensation" for their past service, the majority concludes that the payments are "payable . . . by reason of" the grievance chairmen's former service as Caterpillar employees. In reaching this conclusion, however, the majority does not explain with any specificity what it understands the phrase "by reason of" to mean. Nor does the majority take note of the clear meaning of that phrase in common parlance. If the majority paid more attention to the meaning of this language, it would be forced to recognize that the payments in dispute here are not made "by reason of" the grievance chairmen's past service as Caterpillar employees.

A. Dictionaries define the phrase "by reason of" to mean "because of" or "on account of." See *The Random House Dictionary of the English Language* 1197 (1967); 2 *The Compact Edition of the Oxford English Dictionary* 2431 (1971). When x

is said to have occurred "by reason of" y, what is usually meant is that y was, if not the sole cause of x, at least the or a major cause. If y was simply a "but-for" cause but not a major cause of x, x is not said to have occurred "by reason of" y.

This pattern of usage can be demonstrated by constructing sentences that use the phrase "by reason of" to refer to weak "but-for" causes. Such sentences invariably seem inapt and make it apparent that this use of the phrase "by reason of" is inappropriate. Here are some examples.

President Clinton could not have become President had he not reached the age of 35, but it would be ridiculous to say that he became President "by reason of" having attained his thirty-fifth birthday.

The Green Bay Packers could not have won Super Bowl XXXI without defeating the San Francisco Forty-Niners in the first round of the playoffs. However, it would seem quite odd to say that the Packers won the Super Bowl "by reason of" defeating the Forty-Niners.

The judges of this court almost certainly would not have been appointed if they had not graduated from law school. Yet it would seem very strange to say that the judges of this court were appointed "by reason of" having obtained law degrees.

I believe that these examples show that the phrase "by reason of x" refers at a minimum to a major reason for x, not simply a relatively minor "but-for" cause, and it therefore seems clear that Caterpillar's payments to the grievance chairmen are not made "by reason of" their prior service as Caterpillar employees. Such past service may be necessary for election as a grievance chairman (perhaps because Section 302 is thought to require this) and thus to the receipt of the payments at issue, but past service as a regular Caterpillar employee is certainly not the or a major cause for the payments.² One way to see this is to consider the

² In *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101, 106 (3d Cir.), cert. denied, 479 U.S. 932 (1986), we noted that "[w]hile the Union is correct in asserting that had these

fact that Caterpillar has thousands of former employees, but only a very few of them are ever selected as grievance chairmen. Since all have prior service for the company in common, yet only a handful become chairmen, factors other than prior service for the company must be much more important in influencing their selection.

B. It should be noted that nowhere in its briefs does the union urge that the phrase "by reason of" should be interpreted as requiring merely "but-for" causation. In fact, the government's brief supporting the union agrees with my interpretation of "by reason of". Gov't Br. at 12 (discussing "common understanding of 'by reason of,' as synonymous with 'because,' 'on account of,' 'owing to,' 'due to' etc."). See also Appellant's Reply to Suppl. Br. at 3 ("there is no question" that "an employer may pay a former employee who is also a union official what he is owed *because of his service as an employee* and not one cent more") (emphasis in original) (quotation omitted).

Rather, the union's argument is that "the most natural reading [of 'by reason of'] is that this phrase refers to payments which an individual *earns the right to receive by serving as an employee* but which are not, strictly speaking, remuneration for particular hours of work." Appellant's Br. at 21 (emphasis added). Accord *id.* at 34 ("so long as the right to such payments is earned by previously having performed 'service to the employer'"); Appellant's Reply Br. at 18-19 ("preexisting wage and benefit payments' for an employee elected to a full-time union position qualify as 'payments by reason of' service as an employee, at least where *the right to such payments has been collectively bargained and accrued as a result of the employee's work for the employer.*") (emphasis added) (other emphasis omitted); *id.* at 21 (the "by reason of" exception "leaves no room for payments which were not earned by prior service"). The union

individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways . . . were made 'in compensation for, or by reason of,' their former service to Trailways . . ."

contends that the Eleventh Circuit's opinion in *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), supports its position that Caterpillar's payments to the chairmen were "by reason of" their service as Caterpillar employees. *Phillips* held that payments by a company to a union official were illegal if the union official "did not have a right to such payment before he severed his employment relationship with the company." *Id.* at 1575. The union relies (Br. at 37) on the court's explanation that "[w]hen an employee's right to a benefit has fully vested before the leave of absence begins, there is no danger of corruption when the employer delivers the benefit after that employee leaves the company to work for the union" *Id.* at 1576.

I agree that a payment from Caterpillar to a former employee now working as a grievance chairman would be legal under Section 302 if the chairman's right to that payment vested before he became a former employee. This interpretation of the "by reason of" exception has been adopted by several other courts of appeals. See *Phillips*, 19 F.3d at 1575; *Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989). Cf. *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986).

But the union's argument fails on its own terms here, because it is simply not true that the chairmen's rights to receive the payments at issue vested before they left Caterpillar's employ. On the contrary, their rights to receive these payments are conditioned upon their performance of certain duties in their current positions as grievance chairmen. If, as the union argues, the chairmen's rights to these payments were earned before their employment with Caterpillar terminated, then the chairmen could go fishing all day, every day, instead of processing grievances. Here, contrary to the government's argument, see Gov't Br. at 16, the payments made by Caterpillar *are* measured by the chairmen's current services for another employer, i.e., the union; they can earn as much as 46 hours' pay if they perform sufficient work, but if they perform less work they receive less and if they perform no work—if they just go fishing—they get nothing at all. In this

respect, then, this case is identical to *Trailways*, and the union fails completely in its attempt to distinguish it on the ground that the chairmen are paid at a rate set by Caterpillar rather than by the union.

The basic problem with the union's argument is that it confuses an employee's *eligibility* for a payment with his *right* to it. The chairmen's prior service as employees of Caterpillar rendered them eligible to receive their Caterpillar salaries if they were elected as chairmen, but their prior service in no way gave them any right to receive any amount of money. In my view, it is obvious that their prior service is not the sole or even a major reason for their receipt of the disputed payments. It thus cannot be said—absent outright linguistic torture—that the payments are made “by reason of” their prior service.

C. The majority's main argument in support of its “by reason of” holding is that under the collective bargaining agreement “every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.” Maj. Op. at 9. In other words, the majority views the collective bargaining agreement as providing each employee with the contingent right to receive future payments from the company after that employee's regular service has terminated (the contingencies being the employee's selection and subsequent work as a grievance chairperson). Moreover, the majority appears to argue that a bit of each employee's work under the collective bargaining agreement goes to pay for this contingent right, and the majority therefore reasons that if an employee is later selected as a grievance chairman and receives salary and benefits from Caterpillar, those payments are received “by reason of” the bit of that employee's past service that went to pay for this contingent right.

This argument is inventive—but wrong. At the outset, it should be noted that the majority's argument logically leads to strange results that the majority does not seem to contemplate. The majority's argument is dependent on a grievance chairman's

having “paid,” while working as a regular employee, for the contingent right to receive future payments from the employer. Thus, the argument cannot justify the initial negotiation of a collective bargaining agreement containing a provision such as the one in question here. Suppose that a particular company and union had never before agreed on an arrangement under which the company would pay the grievance chairmen but that the company and the union then enter into such an arrangement. The first group of employees chosen as grievance chairmen would not have previously made any “payments” to the employer in exchange for the contingent right to receive future wages and benefits from the employer. Therefore, even under the majority's theory, the company's payments to the initial group of grievance chairmen would be illegal. In other words, the majority's theory leads logically to the weird result that the company and the initial group of grievance chairmen would have to commit federal felonies in order to set in motion the type of arrangement that the majority sanctions.³

Moreover, although the majority postulates that regular employees “pay” for the contingent right to receive future compensation from the employer, it is by no means clear that this is true in most cases. Obviously, each regular employee gives up wages and/or other benefits in exchange for the employer's payments to the grievance chairmen, but what each regular employee is chiefly “paying” for is not the contingent right to receive future payments from the employer but rather the current improvement in the handling of grievances that presumably results from the work of the grievance chairmen. Indeed, under most circumstances, I suspect that virtually all, if not all, of the “payments” made by a regular employee in any particular year go to fund the employer's payments to the grievance chairmen in that year and not in future years when that employee might himself be a grievance chairman.⁴

³ I would assume that the same would be true every time a new collective bargaining agreement took effect.

⁴ It makes sense that a regular employee should pay little if anything for the contingent right discussed in the text (as distinct from a current improvement

Finally and most importantly, postulating that each regular employee "pays" something for the contingent right to future compensation by the employer does not obviate the problem that past service as a regular employee is not the sole or even a major cause of this future compensation. Assuming that each regular employee makes such "payments" and that the payments are a but-for cause of any compensation that this employee may receive in the future as a grievance chairman, there are two other, more important causes of that compensation: selection as a grievance chairman and the satisfactory performance of the work of a grievance chairman on a daily basis. Thus, to say that a grievance chairman is paid year after year after year "by reason of" his past service as a regular employee makes no more sense than to say that a regular employee is paid year after year after year "by reason of" his having acquired the qualifications that were necessary for his original hiring.

For these reasons, it seems clear to me that the payments at issue in this case are made "by reason of" the chairmen's grievance work and not "by reason of" their prior service as regular employees. Consequently, these payments cannot be squeezed

in grievance handling) because, from the standpoint of a wealth-maximizing regular employee, this contingent right has little if any value. This is so for two reasons. First, this contingent right carries little prospect of financial gain. A regular employee, if selected as a grievance chairman, will have to make future contributions of labor (performing the work of a grievance chairman) that are fully worth the wages and benefits that the employer will provide. (Indeed, under the collective bargaining agreement before us here, a regular employee selected as a grievance chairman does not realize any gain in wages or benefits; he continues to receive the same wages and benefits as he did before.) Second, this contingent right probably does little to increase an employee's chances of obtaining whatever non-monetary gratification may flow from doing the work of a grievance chairman as opposed to the work of a regular employee. Assuming that employees in a particular bargaining unit who are willing to forgo \$x per year in exchange for their employer's payments to the grievance chairmen would be willing to pay the same amount per year in increased union dues so that the union could make these payments, there will be approximately the same number of grievance chairman positions (and therefore approximately an equal chance of performing the work of a grievance chairman) whether or not the grievance chairmen are paid by the employer.

into the "by reason of" exception in Section 302(c)(1), 29 U.S.C. § 186(c)(1), and I am therefore constrained to conclude that these payments are prohibited by the plain language of Section 302.

D. The majority also argues that by exempting payments made "by reason of" a former employee's past service in addition to payments made "as compensation for" that service, Congress must have intended that the two phrases refer to different things. I have no quarrel with this elementary principle of statutory interpretation, but I do not agree with the majority's application of it. The majority fails to acknowledge that three courts of appeals have construed "by reason of" to refer to a class of payments distinct from those covered by the "as compensation for" exemption, and that those courts have not adopted anything like the interpretation espoused by the majority. Because the Eleventh Circuit's discussion in *Phillips* precisely answers the majority's contention, I quote it at length:

Congress, in using the alternative formulations of "as compensation for" and "by reason of" in that provision, intended to remove from the statute's prohibitions two general categories of payments to employees: (1) wages, i.e., sums paid to an employee specifically "as compensation for" work performed; and (2) payments not made specifically for work performed that are occasioned "by reason of" the fact that the employee has performed (or will perform, in the case of a current employee) work for the employer. *The latter category includes employee "fringe" benefits, such as vacation pay, sick pay, and pension benefits.* Whether "as compensation for" or "by reason of" service to an employer, all payments from an employer to a union official must relate to services actually rendered by the employee for the section 186(c)(1) exception to apply. * * *

An employee's "right" to receive a "benefit" while on leave with the union has been upheld when it vested *before* the employee began the leave of absence *In contrast, the section 186(c)(1) exception does not apply*

when a company pays a union official who was a former employee, but who did not have a right to such payment before he severed his employment relationship with the company.

19 F.3d at 1575 (first and third emphases added) (citations omitted). *BASF Wyandotte Corp.*, on which *Phillips* principally relied, deemed "fring[e] benefits" such as "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits, and the like" to be within the "by reason of" exception. 791 F.2d at 1049. *Accord Toth*, 883 F.2d at 1303 n.8 (severance payments are "by reason of" former employee's past service). These decisions are consistent with *Trailways*' holding that the payments to former employees contemplated by section 302(c)(1) are those that relate to "past services actually rendered by those former employees *while they were employees of the company*." *Trailways*, 785 F.2d at 106 (emphases in original).

Thus, the distinction between the "alternative formulations" is that "compensation" refers to *wages* paid for specific work performed, while "by reason of" refers to *non-wage payments* made after an employee becomes a former employee but earned while he or she was still an employee.⁵ In contrast to the Second, Seventh, and Eleventh Circuits, the majority here holds that the "by reason of" exception refers to *wage payments* that would not be made *but for* the recipient's prior service as an employee.

E. The only justification for disregarding the plain meaning of the "by reason of" exception would be that it would pro-

⁵ In *Toth*, the Seventh Circuit interpreted our decision in *Trailways* as resting on the proposition that "any compensation continuing beyond the time of an employee's 'past' employment could not be 'by reason of' [that] employment." 883 F.2d at 1302. While I am less confident than the *Toth* court that *Trailways* should be read so to hold, I agree with the *Toth* court that some payments made after the termination of the recipient's employment with the company can be made "by reason of" his or her prior employment. What is important is whether the recipient has a right to the payment before he or she leaves the company, not the date on which the payment is actually made or received. See *Toth*, 883 F.2d at 1302 (criticizing *Trailways* for this reason).

duce "a result demonstrably at odds" with congressional intent or "would thwart the obvious purpose of the statute." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quotation omitted), but the majority does not even attempt to make such a showing. I see nothing that demonstrates that following the plain meaning of the statutory language would produce a result that is demonstrably at odds with Congress' intent. I find nothing conclusive in the legislative history, and while I agree with the majority that the payments in question here are quite different from "bribery and extortion," Maj. Op. at 11, there are reasons, many of which are set out in Judge Mansmann's opinion, why Congress might have wished to preclude such employer payments. I will simply note that this very case serves as an example of why Congress might have wanted to prohibit the payments at issue. The majority's description of these payments as "innocuous" (Maj. Op. at 7) ignores the fact that Caterpillar's decision to stop paying the chairmen's salaries was designed to "put economic pressure on the Union" during the strike. (App. 144) Prohibiting company control over such payments furthers the goal of union independence by removing this weapon from the company's arsenal. In short, while I am unsure whether this prohibition is on balance desirable or undesirable, I am certain that it is far from absurd. The "explicit statutory direction" that the majority purports to find wanting (Maj. op. at 11) is plainly contained in the text of Section 302.

The history of "no docking" provisions, which seems to form the centerpiece of the union's submission, also does not persuade me to disregard the plain statutory language. "No docking" provisions differ, at least in degree, from the type of arrangement that is before us, and there are times in the law when differences in degree are dispositive. In any event, the legality of "no docking" provisions is unsettled; that question is not before us; and, like Judge Mansmann, I would not reach it here.

Since Section 302 is a criminal statute, I would apply the rule of lenity if I thought that the statutory language was ambiguous, see, e.g., *Crandon v. United States*, 494 U.S. 152, 158 (1990), but since I see no ambiguity, I find that rule inapplicable.

See Reno v. Koray, 115 S. Ct. 2021, 2029 (1995), (rule of lenity applies only "if, 'after seizing everything from which aid can be derived,' we can make 'no more than a guess as to what Congress intended'" (citations omitted)). I would therefore affirm the decision of the district court. If this result is not desirable as a matter of public policy, the union and its amicus, the United States, surely understand how to seek correction in Congress.⁶

A True Copy:
Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

⁶ Indeed, the government's amicus brief seems at places to amount to a request that we craft a legislative solution to the problem of collective bargaining agreements that call for employers to make payments to former employees who become union officials. According to the government's brief, such payments may violate Section 302 if they are "incommensurate" with the recipient's former compensation as a regular employee, if the recipient negotiated the right to receive those payments, or if the recipient has not worked for the employer in his or her regular job for an extended period and is unlikely ever to return to such work. U.S. Amicus Br. at 26-28. These may be sensible rules, but I am unable to tease them out of the current language of Section 302. They provide material for legislative, not judicial, consideration.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation
doing business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA; and its affiliated
LOCAL UNION 786,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 92-01854)

Present: Sloviter, *Chief Judge*, and Becker, Stapleton,
Mansmann, Greenberg, Scirica, Cowen, Nygaard, Alito, Roth,
Lewis and McKee, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on August 8, 1996 and reargued in banc on December 2, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 12, 1995, be, and the same is hereby reversed. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Douglas P. Sisk
Clerk

Dated: March 4, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation
doing business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA; and its affiliated
LOCAL UNION 786,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 92-01854)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON,
MANSMANN, GREENBERG, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS, and McKEE,
Circuit Judges.

ORDER

A majority of the active judges having voted for rehearing en banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing en banc at the convenience of the court.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: October 11, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854

CATERPILLAR, INC.,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated Local Union 786,
Defendants

MEMORANDUM

We are considering the parties' cross motions for summary judgment.

I. BACKGROUND

Plaintiff, Caterpillar Inc. ("Caterpillar"), is engaged in the manufacture, sale, and distribution of heavy equipment at plants throughout the United States, including a facility in York, Pennsylvania. Defendants are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and its Local Union 786 ("Local 786").¹ Since 1954, Caterpillar has recognized the UAW and Local 786 as the exclusive collective bargaining representative for certain of its employees at its York plant.²

¹ We will, at times, refer to the Defendants jointly as "the Union."

² Caterpillar also recognizes the UAW and its respective affiliated Local Unions as the exclusive collective bargaining representative at many of its other plants.

Prior to 1973, the parties' collective bargaining agreements contained provisions specifically authorizing union representatives such as stewards, chief stewards, and committeemen to leave their jobs to handle grievance related matters, without loss of pay and while maintaining their status as full-time Caterpillar employees. In 1973, Caterpillar agreed to allow union committeemen and grievance committee chairmen to work full-time in their union capacities while still receiving wages and benefits from the company. These individuals are paid the wages and benefits earned on their last job with the company, but are considered to be on leave of absence. At Caterpillar's York facility, these individuals are Local 786's Grievance Committee Chairman and its Alternate Chairman (collectively "the Chairman").

The parties' most recent collective bargaining agreement expired on November 30, 1991. The UAW and many of its locals subsequently began a strike against Caterpillar, although members of Local 786 did not participate. The striking employees eventually returned to work without a contract. On October 30, 1992, Caterpillar notified the UAW that it would stop paying the Chairman, and the other grievance committee chairs at other plants, as of November 16, 1992. In the letter informing the UAW of its decision, Caterpillar stated that

Indeed, one may even question the legality of such payments. Therefore, effective November 16, 1992, and continuing until a new agreement is reached, Caterpillar no longer intends to subsidize the UAW by paying wages to or by providing coverage at no cost under the Group Insurance Plan for the Union's various chairmen of grievance committees . . .

[Letter from J.L. Brust to Elliott Anderson of 10/30/92]. On November 17, 1992, the UAW responded by filing an unfair labor practice charge with NLRB offices in Baltimore, Maryland, and

Peoria, Illinois, alleging a violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158.³

On December 21, 1992, the NLRB notified the parties that, if no settlement was imminent, the NLRB would file a similar complaint against Caterpillar. The next day, Caterpillar filed the instant action, seeking a declaration that the payments to the Chairman are illegal under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186.

Because of the pending NLRB proceedings, on May 24, 1993, this action was stayed. Thereafter, the UAW and its locals, including Local 786, began another strike against Caterpillar.⁴ On January 31, 1995, NLRB Administrative Judge James L. Rose issued a Decision and Recommended Order dismissing the Union's unfair labor practice charges. He concluded that the Union is responsible for the duties performed by the Chairman and decides the manner in which they are performed. He then determined that Caterpillar's payment of wages and benefits to the Chairman violated sections 8(a)(3) and 8(b)(2) of the NLRA.⁵ Although the Administrative Judge's recommendation is not a final decision of the NLRB, because of the pendency of this case since 1992, we lifted the stay and both parties filed motions for summary judgment.

3 These provisions require an employer to bargain in good faith with his employees' representative before unilaterally changing a term or condition of employment. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 542-43, 108 S. Ct. 830, 832, 98 L. Ed. 2d 936, 943 (1988).

4 Recently, the UAW ordered the striking workers back to work, notwithstanding the fact that no new agreement has been reached.

5 He also noted that "I believe that payments to the chairman and full-time committeemen raise a serious issue under Section 302. Even if benign, Articles 4.6 and 4.7 shift the financial responsibility for certain full-time union officials from the Union to [Caterpillar]." [Decision at 7]. However, he declined to reach the issue of whether the payments violated section 302 because they were facially violative of section 8 of the NLRA.

II. LAW AND ANALYSIS

A. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986). Summary judgment must be entered in favor of the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party" *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted).

When a moving party has carried his or her burden under Rule 56, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted). The nonmoving party "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment," and cannot "simply reassert factually unsupported allegations contained in [the] pleadings." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (emphasis in original) (citation omitted). However, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986) (internal citations omitted).

B. Section 302

Plaintiff seeks a declaration that payments to the Chairman are unlawful under section 302(a) of the LMRA. That section provides that

It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other things of value—

- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce;

. . .

29 U.S.C. § 186(a). It is undisputed that Caterpillar is an employer in an industry that affects commerce and that the Chairman is a representative of Caterpillar's employees. Thus, it would appear that Caterpillar's payment of his wages would be unlawful. However, section 302(c) of the LMRA provides that

[t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer.

29 U.S.C. § 186(c).⁶ Defendants argue that the Chairman is an employee of Caterpillar, that the payments are for his services to

⁶ The parties disagree over who has the burden of proof on these issues. Plaintiff maintains that the payments are presumptively improper under section 302(a), and that the Defendants carry the burden of establishing that one of the affirmative defenses of section 302(c) is applicable. Defendants argue that Plaintiff must establish that the payments are improper, and, in doing so, show that none of the enumerated exemptions of section 302(c) apply. Although it appears that Defendants must prove that one of the exceptions of section 302(c) applies, our decision would be unaffected regardless of which party had the burden of proof. See *United States v.*

Caterpillar, and that the payments are permissible under section 302(c)(1).⁷

The Third Circuit addressed these issues in *Trailways Lines v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932, 107 S. Ct. 403, 93 L. Ed. 2d 356 (1986). In that case, the employer instituted an action against the union seeking a declaration that a section of the parties' collective bargaining agreement, which required the employer to make contributions to a joint union-management pension trust fund for employees who took leaves of absence to accept full-time positions with the union, violated section 302. *Id.* at 102. The court first noted that "[t]here is no dispute that Trailways' payments to the Pension Trust Fund would be prohibited by § 302(a) unless they fall within one of the express statutory exemptions provided by section 302(c)" *Id.* at 103-04. Similarly, there is no dispute in this case that the payments to the Chairman would violate section 302(a) unless one of the enumerated exceptions apply.

Alaimo, 191 F. Supp. 625, 626 (M.D. Pa.), *aff'd*, 297 F.2d 604 (3d Cir. 1961), cert. denied, 369 U.S. 817, 82 S. Ct. 829, 7 L. Ed. 2d 784 (1962) ("It is incumbent upon one who relies upon an exception [in section 302(c)] to set it up and establish it").

- 7 Defendants also advance three other defenses to Plaintiff's claim. However, each lacks merit. First, Defendants argue that Plaintiff's claim is moot because the collective bargaining agreement which called for the payments in question has expired. There is currently no contract between Caterpillar and the Defendants, although it appears that the striking employees have just been ordered by the Union to return to work. The parties are negotiating a new contract and this issue is, undoubtedly, part of that process and is not moot. See, e.g., *American Comm. Barge Lines Co. v. Seafarers Intern. Union*, 730 F.2d 327, 332-33 (5th Cir. 1984) (discussing mootness of proposed injunction against strike and bargaining demands).

Next, citing a similar provision of the NLRA, Defendants assert that a six-month statute of limitation is applicable to Plaintiff's claim, see 29 U.S.C. § 158(b)(6), and/or that the doctrine of laches prohibits Plaintiff's claims. However, we do not read Plaintiff's complaint to seek redress for past payments. Instead, it seeks a declaration that future payments are unlawful under section 302. Thus, the statute of limitations and/or doctrine of laches are inapplicable.

The defendant in *Trailways* argued that two exceptions, section 302(c)(1) and section 302(c)(5), were applicable there.⁸ The court held that the exception in section 302(c)(5) was inapplicable because the employees were not "current employees" of the employer, but were instead "former employees" of the employer who had become current employees of the union. *Id.* However, the court could not use the same analysis with respect to section 302(c)(1) because that exception applies to "an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1) (emphasis added).⁹ In addressing the claimed exemption of the former employees, the court found that "clearly the statute contemplates payments to former employees for past services actually rendered by those former employees while they were employees of the company." *Id.* at 106 (emphasis in original). Because there was no evidence that the payments were for past services actually performed by the former employees for the employer, the court held that the section 302(c)(1) exception did not apply. *Id.*

Here, we must determine two related issues: (1) whether the Chairman is a current "employee" of Caterpillar; and (2) whether the payments to the Chairman are for services rendered to Caterpillar.¹⁰

8 Section 302(c)(5) is not applicable in the instant case.

9 Plaintiff misrepresented the holding of *Trailways* when it asserted that the court, in construing the exemption in § 302(c)(1), "held the exemption applies only to current and active employees of the employer." [Pl.'s Mem. in Opp'n to S.J. at 7].

10 We recognize that, technically, we need not determine whether the Chairman is an "employee" of Caterpillar, since section 301(c)(1) applies to both current and former employees. However, as set forth below, resolution of this issue facilitates the determination of whether the Chairman is being paid for services rendered on behalf of Caterpillar.

1. *Is the Chairman a current and active employee of Caterpillar?*

"[T]he issue of the status of employees is not solely a question of contract. Rather, it is a question of law turning also on the degree of control exercised by the employer over the employee, and on a determination of for whose benefit the employee is performing his services." *Id.* at 106 (citation omitted)" In considering the facts presented, the court in *Trailways* held that "[u]nder either of these tests, the individuals here cannot be considered [the employers'] employees while on leave, since they are in no way controlled by [the employer], nor do they perform any services for the benefit of [the employer]." *Id.* at 107.

Plaintiff argues that the decision in *Trailways* mandates judgment in its favor because it is undisputed that the Chairman is an employee of the Union, and not an employee of Caterpillar. Defendants maintain that the Chairman is an employee of Caterpillar. Applying the tests set forth in *Trailways*, we conclude, as a matter of law, that the Chairman is not a current employee of Caterpillar.

The first test for employee status concerns the degree of control exercised by the employer over the employee.

Trailways, 785 F.2d at 106. In support of their argument that the Chairman is an employee of Caterpillar, Defendants assert that his

duties paid by Caterpillar revolved completely around the Caterpillar workers and were closely controlled. The functions for which Caterpillar paid and did not pay, the method of selection of the positions, the place where the individuals were to work, the amount Caterpillar paid (tied to the individual's last Caterpillar

11 Defendants assert that "*Trailways*' reliance on these factors to determine 'present employee' status was rejected in *NLRB v. Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986)." [Defs.' Br. in Opp'n to S.J. at 5 n.2]. Assuming *Wyandotte* did reject *Trailways*, we are bound to follow controlling Third Circuit law.

position prior to assuming the full-time Chairman and Alternate position) are all set forth in great detail in the CBA. In addition, the full-time Chairman and Alternates were in frequent contact in person and by phone with Caterpillar's managers and foremen, and the York Chair spent an average of one and one-half days per week at the plant. When the York Chair performed Union activities not identified by the collective bargaining agreement as resolving around grievance and related problem-solving, he was "called out" and not paid by Caterpillar. This frequently resulted in Caterpillar paying him for less than 46 hours in a week.

[Defs.' Br. in Opp'n to S.J. at 10]. Further, Defendants argue that the Chairman: was assigned to a particular shift and required to get permission from Caterpillar to change shifts; had to notify Caterpillar if he was to be late, leave early, or take sick time or vacation; received pay checks identical to other employees; was classified as an active employee for other purposes; and turned in weekly time cards.¹²

Even assuming Defendants' assertions are true, they have no impact on the issue of who controlled the Chairman's work and the manner in which that work was performed. Each of the facts set forth by Defendants is related to Caterpillar's payment of the Chairman's wages. In order to pay the Chairman, Caterpillar had to know what hours he worked, when he was on vacation, on sick leave, and when he was performing duties outside those contemplated by the collective bargaining agreement. This does not mean, however, that he was an "employee" of Caterpillar. Otherwise, any company that paid an individual's wages, and required an accounting of the hours worked, would be deemed an employer of that individual.

Caterpillar does not exercise sufficient control over the Chairman to classify him as its employee because Caterpillar did

12 Defendants do not identify the source of this "evidence" other than a reference to "Orndorff Declaration."

not control the tasks that the Chairman performed, or the manner in which they were performed. At the NLRB Hearing, Orndorff testified that during the time he was acting as Grievance Committee Chairman, he did not receive job assignments from Caterpillar. [NLRB Hearing at 4467].¹³ Further, in discussing his duties as Chairman, both in his deposition and his testimony, Orndorff never indicated that he had duties other than those directly related to the Union. At the NLRB Hearing, Judge Rose questioned Orndorff as follows:

Q: Now, how many of those hours did you actually spend at the plant:

A: Probably a day a week I actually spent in the plant.

Q: Eight hours?

A: Yes.

Q: And the rest of the time was in the Union Hall?

A: Working out of the Union Hall or—yes, sir.

Q: Okay. Now tell me, did the Company know what you were doing when you were at the Union Hall?

A: I wouldn't see how they would know everything I did. No.

Q: You didn't have a Company supervisor or anybody at the Union Hall?

A: Nobody from the Company was at the Union Hall, no, sir.

Q: So they would have no way of knowing what you did?

A: I wouldn't have any—no, they wouldn't have any that I know of.

¹³ Specifically, when asked whether the company had assigned job duties, Orndorff stated that "I worked out of the Union Hall. That's—I had my privileges under 4.6." *Id.*

Q: They wouldn't know whether you were working on grievances or working on Union business or doing crossword puzzles or what?

A: Absolutely.

Q: Is that correct?

A: I would say, yes.

[NLRB Hearing at 4500-01]. Additionally, Orndorff testified that, to his knowledge, no one from Caterpillar ever went to the union hall to check on his work as chairman. [Orndorff Dep. at 43-44]. In response, Defendants have not identified any evidence that indicates that the Chairman's work was controlled by Caterpillar and we conclude that Caterpillar did not exercise control over the Chairman's activities.

The second test for employee status is "for whose benefit the employee is performing his services." *Trailways*, 785 F.2d at 106. Defendants suggest that Caterpillar receives the benefit of the Chairman's employment because the processing of grievances is "integral" to an employer. However, it is clear that the Chairman performs his services for the benefit of the Union. In his deposition, Orndorff testified as follows about his position:

Q: What were your duties?

A: My duty is represent the members of Local 786.

Q: In what capacity?

A: As their chairman.

Q: As chairman of the grievance and bargaining committee; is that correct?

A: Yes, sir.

Q: Okay. What does then—what do you do as the chairman of the grievance and bargaining committee as of November 15, 1992?

A: Try to interpret and enforce the contract on behalf of members of Local 786.

Q: Anything else?

A: I don't understand what you mean.

Q: Did you do anything else in carrying out your duties?

A: A lot of things that were not spelled out there as far as joint things between the company and union that, again, were in the best interest of the members of Local 786.

[Orndorff Dep. at 27-28]. It is clear from the Chairman's testimony that his position is intended to, and does in fact, substantially benefit the Union. While Caterpillar may indirectly benefit in some fashion from the Chairman's activities, there can be no dispute that it is the Union and its members that receive the direct and significant benefit from his work. See *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 862 (7th Cir), cert. denied, 434 U.S. 921, 98 S. Ct. 395, 54 L. Ed. 2d 277 (1977).

On this basis, we conclude that the Chairman is not a current and active employee of Caterpillar for purposes of the exemption in section 302(c)(1).

2. *Are the Chairman's wages paid as compensation for services rendered to Caterpillar?*

The paramount question is whether the Chairman's wages are paid for services rendered to Caterpillar. The fact that the Chairman is not a current employee of Caterpillar mandates that, for the payments to be legal, they must have been payment for services rendered while he was an employee of Caterpillar. *Trailways*, 785 F.2d at 107. Here, as in *Trailways*, nothing in the record could support such a conclusion.¹⁴

¹⁴ Even if we determined that the Chairman is a current Caterpillar employee, we would still conclude, as a matter of law, that the wages he receives are not for services rendered for Caterpillar. This is true because the evidence shows that, as in *Trailways*, the Chairman performed *no functions* on behalf

Defendants argue, citing *Communications Workers of America v. Bell Atlantic Network*, 670 F. Supp. 416 (D.D.C. 1987), that because the Chairman's wages are based upon his last position with the company, those payments are for services rendered on behalf of Caterpillar. In *Communications Workers*, the court distinguished *Trailways* on this ground because the payments in *Trailways* were based on the former employee's position with the union. *Id.* at 421-22. However, we find the distinction made in *Communications Workers* unpersuasive. The fact that the Chairman's wages are calculated on the basis of his last position with the company does not, in any way, mean that those wages are for services rendered while he was an active Caterpillar employee. In *Trailways*, the court determined that the payments were improper because there was no evidence that they were in recognition of the employee's past services to the employer. The record here is devoid of evidence that the Chairman's wages are for services rendered while he was employed by Caterpillar.¹⁵

C. *Conclusion*

We hold, as a matter of law, that the Chairman is not a current employee of Caterpillar because Caterpillar does not exercise sufficient control over his duties and does not significantly benefit from the performance of those duties. Further, the payments to the Chairman are not for services rendered while he was an employee of Caterpillar. Accordingly, the exemption of section 302(c)(1) is inapplicable, and any payments made by Cat-

of Caterpillar. Rather, his job was to act "in the best interest" of the Union. Thus, payment to the Chairman is impermissible whether or not he is classified as a current employee of Caterpillar.

¹⁵ In their reply brief, Defendants state that "[w]hile Defendants should prevail under *Trailways*, if *Trailways* could be read to prohibit the payments in this case, *Trailways* should be overruled to that extent." [Defs.' Reply Br. at 12-13 n. 16]. This statement illustrates the only argument that Defendants can and do make here: *Trailways* was wrongly decided. However, even if we were inclined to agree, which we are not, we are without power to overrule a decision of the Third Circuit.

erpillar to the Chairman are unlawful under section 302(a) of the LMRA.¹⁶

We will issue an appropriate Order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: December 8, 1995

¹⁶ Defendants argue that the goals of section 302 are not furthered by holding that these payments are unlawful, and that payments of this sort are commonplace today and have been so for many years. Admittedly, the purpose of section 302 was to "prevent bribery, extortion, shakedowns, and other corrupt practices." *Communications Workers*, 670 F. Supp. at 424 (citing H.R. Rep. No. 286, 91st Cong., 1st Sess. 1-2, reported in 1969 U.S. Code Cong. & Ad. News at 1159-60). Further, we recognize that our decision could have far reaching effects on not just these parties, but on other employer/labor union relationships. However, in applying the plain language of section 302, as defined by the Third Circuit in *Trailways*, we must conclude that the proposed payments are unlawful.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854

CATERPILLAR, INC.,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated Local Union 786,
Defendants

ORDER

AND NOW, this 8th day of December, 1995, it is ordered
that:

1. Plaintiff's motion for summary judgment, filed October 19, 1995, is granted.
2. Defendants' motion for summary judgment, filed October 19, 1995, is denied.
3. Any payment of wages by Caterpillar to the Chairman or Alternate Chairman of the Grievance Committee of Local 786 in the circumstances of this case would violate section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a).
4. The Clerk of Court shall enter judgment in favor of the Plaintiff and against Defendants, and close this file.

/s/ William W. Caldwell
William W. Caldwell

United States District Judge
 IN THE UNITED STATES DISTRICT COURT
 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854
 J. Caldwell

CATERPILLAR, INC.,
 Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
 AEROSPACE AND AGRICULTURAL IMPLEMENT
 WORKERS OF AMERICA AND ITS AFFILIATED
 LOCAL UNION 786,
 Defendants

JUDGMENT IN A CIVIL CASE

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the plaintiff, Caterpillar, Inc., and against the defendants, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICUL-

TURAL IMPLEMENT WORKERS OF AMERICA AND ITS
 AFFILIATED LOCAL UNION 786.

December 8, 1995
Date

Mary E. D'Andrea
Clerk

/s/ George T. Gardner
 (By) Deputy Clerk
 George T. Gardner

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1994 & Supp. I 1995), provides as follows:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the

absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the dis-

trict court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to in-

itiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industrywide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and

be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

JD-8-95
Peoria, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

33-CA-9990
33-CA-10033

CATERPILLAR, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA AND ITS LOCAL 974

Deborah A. Fisher, Debra L. Stafanik and Valerie L. Ortique, Esqs.,
of Peoria, Illinois, for the General Counsel.

Stanley Eisenstein and Jane Bohman, Esqs. of Chicago, Illinois,
and *Nancy Schiffer, Esq.* of Detroit, Michigan, for the Charging
Party.

Columbus R. Gangemi, Jr., Gerald C. Peterson and Joseph J. Torres, Esqs., of Chicago, Illinois, and *Thomas G. Harvel, Lee Smith Esqs.,* of Peoria, Illinois for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This phase of the consolidated proceeding was tried before me on various dates from November 15, 1993, through December 3, 1993, at

Peoria, Illinois. In general, it is alleged that effective November 16, 1992, the Respondent withdrew its previous practice of paying the wages and benefits to certain employees who are elected by the union member ship to handle grievances full time, which payments are a mandatory subject of bargaining, and thus the Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended. 29 U.S.C. § 151 *et seq.* It is also alleged that the Respondent unlawfully refused to continue to recognize and deal with these individuals.

The Respondent argues that payments to the grievance committee chairmen and the full-time committeemen are not a mandatory subject of bargaining; therefore, as a matter of economic pressure and to pursue its bargaining ends, it was privileged to withdraw the payments. The Respondent further argues that the payments are inherently discriminatory and violative of Sections 8(a)(3) and 6(b)(2). The Respondent contends that it continued to recognize and deal with other individuals who also handle grievances and would recognize the chairmen and full-time committeemen if they applied for leaves of absence.

The Respondent also argues that the payments which it withdrew were violative of Section 302 of the Act; however, this was specifically not advanced as a reason for its action. As will be discussed below, Section 302 is in issue, Counsel for the General Counsel contending she has the burden of proving that the pay in question was not violative of Section 302.

Although the captioned cases were consolidated with others for trial, they have been severed for briefing and decision. Nevertheless, those relevant portions of the record made at other times have been considered, along with briefs and arguments of counsel. Upon the record as a whole, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Delaware corporation with its principal office at Peoria, Illinois, and facilities throughout the United States and overseas. The Respondent is engaged in the manufac-

ture and sale of heavy construction machinery and related products. In the course and conduct of this business, the Respondent annually sells and ships directly to points outside the State of Illinois, goods, products, and materials valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Charging Party, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Locals 145 (Aurora), 751 (Decatur), 786 (York), 974 (Peoria and Mossville) and 2096 (Pontiac) are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act. Herein "Union" refers to the International alone or with together with the locals.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts in Brief.

Though the record on this phase of the case is extensive, there is really little factual dispute. To summarize: The parties' most recent collective bargaining agreement was effective from October 21, 1988, through September 30, 1991. On September 28, it was agreed to extend it indefinitely, however, on November 4, the Union terminated the extension and called a selective strike at Decatur and Building SS in East Peoria. On November 7 the Respondent locked out employees at Aurora, Pontiac and those employees at East Peoria and Mossville who had not struck. This lockout was terminated on February 16, 1992,¹ at which time the Union converted the lockout to a strike.

On or about April 1, the Respondent notified the Union and all employees that effective April 6 it would begin hiring permanent replacements if the employees did not return to work. About 1000 striking employees crossed the picket line and did

¹ All dates hereafter are in 1992, unless otherwise indicated.

return. Effective April 16 the Union recessed the strike. Subsequently there have been seven short work stoppages at various of the Respondent's facilities and a general strike commencing on July 20, 1994, which continues to the date of this decision.

The events for decision here focus on the Respondent's decision, communicated to the Union on October 30, to cease paying wages-and other benefits to individuals who under the expired contract (and the Respondent's implemented final proposal) are designated grievance committee chairmen and full-time committeemen.

Article 4 of the Central Agreement sets forth the structure of "a system of Union Representation for the processing and settlement of grievances." At Aurora, Decatur, York, Pontiac, and other locations not involved here, there is established a Plant Grievance Committee which consists of some number of employee members (which differs for each plant) and a chairman. At each of these plants, and for each of the respective locals, under Article 4.6, the parties agreed that the full-time chairman would be considered on leave of absence and paid by the Respondent "his regular shift hours during the regular workweek" at the rate he was receiving just prior to election to office, and "shall conduct his business from the Local Union office." In all cases, the office is near the plant, but off the plant premises.

In addition, any "such Chairman who spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay for such."

Article 4.7, along with Article 2 of the Local Supplement deals with the privileges and pay for Local 974 chairmen and full-time committeemen. For Local 974, there are 14 Grievance Committees, 12 of which have two full-time members, of whom one is the chairman. Therefore, Local 974 has 26 chairmen and full-time committeemen who are paid according to Article 4.7 of the Central Agreement, which, like 4.6, includes an additional 6 hours pay for each such individual who functions as a chairman or full-time committeeman at least 8 hours in a workweek. They

are also considered on leave of absence. The provisos and minimum requirements are not germane here.

Under Article 2 of each local supplement, it is provided that there shall be one steward for each foreman and that when exercising any of the enumerated duties, the steward will suffer no loss of pay. The steward processes grievances at Step 1. Step 2 of the grievance procedure may be handled by a part-time committeeman, who similarly will suffer no loss of pay. Apparently it is contemplated, and is the practice, that second steps can be handled by full-time committeemen (in the case of Local 974) or in all cases, the chairman. Third steps are handled by the chairman, or in his absence, a committeeman.

In addition Article 14.10 of the Central Agreement provides for unpaid leaves of absence to employees for the purpose of attending union meetings and related functions. This is sometimes referred to in the record as "union call out" and is the provision under which the chairmen and full-time committeemen are released to attend arbitration proceedings. In such cases, the part-time committeeman becomes full time and the chairman or full-time committeeman is paid by the Union.

When the Union recessed the first strike, the employees returned to work under the terms of the implemented proposal of the Respondent. This included the substance of the above outlined articles, the only changes proposed being of the housekeeping variety. Thus, stewards continued to process grievances at the first step, committeemen at the second and chairmen at the third.

The chairmen and full-time committeemen under consideration would be considered assistant business agents in the construction or retail food industry. However, unlike those individuals, who typically deal with many employers, the committeemen deal with only one. Nevertheless, they handle the grievances and contract administration for several hundred employees. And they do this full time.

Much of this record is devoted to the issue of whether the chairmen and full-time committeemen are production employees who incidentally do representational work, like stewards, or whether they are full time union employees during their tenure in office.

There are some indicators of a continuing employer/employee relationship as to the chairmen and full-time committeemen. Thus, the committeemen of Local 974 have badges and must sign in and out of their areas. They are required to be present at their respective work locations for the entirety of their respective shifts, except they may alter the time they work, in order to service other shifts, on notification to an appropriate secretary; and, they may spend eight hours each week away from the plant, at the union hall or sub-regional office.

The committeemen are given regular performance evaluations and are subject to discipline. For instance, John Harris, a grievance committee chairman for Local 974, was once given a discipline write-up for leaving the plant without permission in order to go to the local credit union on personal business.

The committeemen accrue, and can take, personal and vacation time and when they do, the part-time committeeman becomes a full-time committeeman.

Although the Local 974 chairmen and full-time committeemen are accountable for their time and attendance four days a week, the other chairmen are not at all. Under Article 4.6, they conduct business from the union hall, which is typically a short distance from the plant, however they spend some of their time at the plant in connection with investigating and handling grievances. No doubt all the chairmen and full-time committeemen of Local 974 devote most of their working day to grievances and contract administration; however, they and the other chairmen spend substantial time away from their respective plants where what they do is unknown to the Respondent.

While the Charging Party seems to maintain that never do the chairmen and committeemen do anything during the work

week other than handle grievances and engage in contract administration, such is difficult to believe. These are elected officers of their respective local unions. They are among the leadership. It is simply not credible that during their time at the local union hall, chairmen and committeemen never discuss matters of general union interest, including tactics and strategy involved in this labor dispute. Neither the General Counsel nor the Charging Party brought forth evidence tending to support the argument that these individuals in fact spend forty hours every week engaged only in grievance or contract administration activity.

Conversely there are indicators suggesting the chairmen and full-time committeemen are really employees of the Union. They are responsible to the membership for their work product. The Respondent has no control over the manner and means by which they perform their function as representatives of the employees. At most, the Respondent requires them to be present at their work area 32 hours a week; however, they have freedom to change their starting and quitting time. They need only notify an appropriate secretary.

They are "considered as on leave of absence." While the Charging Party contends this language means they are not in fact on a leave of absence, I cannot conceive what else it may mean. The "considered" I conclude relates to the fact that they are paid by the Respondent, as opposed to those on leaves without pay under Article 14.10.

The fact of the matter is that they perform no productive work for the Respondent. They do perform work for the Union. They represent employees in the second and third steps of the grievance procedure and in such capacity have authority to settle grievances on behalf of the Union and the grieving party. In this they answer to the membership, and not the Respondent. It is the Union and the membership which determines their tenure, not the Respondent.

It is no doubt the case that the Respondent retains some control over them such that in appropriate circumstances they

could be disciplined or discharged. Day to day, however, they answer to the Union and do the Union's business.

Though only required to work 40 hours per week, the chairman and committeemen are paid for 46, which the Union proposed to increase to 54. There may be some policy argument for the extra pay, such as other employees are eligible for overtime. Nevertheless, the chairmen and committeemen are paid extra because of their union elected positions.

Al Weygard, chairman for Local 145 at Aurora testified that the extra 6 hours was negotiated in 1973 because the committeemen had no opportunity to work overtime; however, he also testified that he was paid the 6 hours irrespective of whether production employees worked overtime. In fact for some time the Union had been discouraging voluntary overtime. Weygard was entitled to, and received, the extra pay if he functioned as the chairman for just 8 hours in a workweek. He testified that his hourly rate was \$16.97. Therefore, the bonus he received as chairman was \$101.82 per week.

Similarly, the base pay they receive is by virtue of their union elected positions, and not because they do any production work. They are paid for being full-time committeemen. Along with the pay they are granted certain enumerated privileges and any others which have "been mutually agreed upon."

Though the precise figure is unclear, it is undisputed that the pay and benefits to the chairmen and full-time committeemen is substantial—in the range of \$50,000 per individual. The Respondent estimates that the pay and benefits for them is about \$1.8 million annually, an amount which is accepted by the Charging Party. Thus, for Local 974 for instance, the Respondent pays an annual subsidy of about \$1,300,000 which the Local would have to pay if it had and paid the 26 chairmen and full-time committeemen designated in the contract. Presumably the work these individuals do is important. Therefore the Union would have to pay them, in the absence of the Respondent's agreement to do so.

On October 30, Jerry Brust, the Respondent's Director of Corporate Labor Relations, wrote the Union, stating, among other things, that as of November 16 the Respondent would no longer "subsidize the UAW by paying wages to or by providing coverage at no cost under the Group Insurance Plan for the Union's various chairmen of grievance committees, full-time grievance committee men or the replacements." Brust named the 29 individuals affected by this determination. He did state, however, that stewards and part-time committeemen who process grievances on an as needed basis could continue to do so without any loss of pay. And he stated that the Respondent would continue to recognize the chairmen and full-time committeemen if they applied for leaves of absence under Article 14.10.

Brust testified that this was an attempt to put economic pressure on the Union in support of its position with regard to negotiating a successor contract. He also testified that the Union had withdrawn from participation in various joint programs, had tried to influence customers not to buy the Respondent's products and in general, through these union officers, had engaged in activity to reduce production.

In subsequent discussions with committeemen who continued to seek to represent employees in grievance matters, managers of the Respondent declined to recognize them unless they requested leave under Article 14.10. The Respondent advised the Union that it would deal with committeemen who requested such leave, but not otherwise. And when most of the committeemen returned to their production jobs, the Respondent recognized only stewards and part-time committeemen as grievance handles. The Respondent would not allow the full-time committeemen to handle grievances under the no docking provisions of the contract, and such is independently alleged as violative of Section 8(a)(5).

B. Analysis and Conclusions.

1. Motion to Stay.

Inasmuch as the merits of this matter may depend on whether the suspended payments were violative of Section 302,

the Respondent has moved that the decision here be stayed until such time as the Federal District Court for the Middle District of Pennsylvania has ruled in a parallel case in which the International and York local are named defendants.²

This action was filed on December 22, whereby the Respondent seeks a declaratory judgment concerning the validity of payments to committeemen under Section 302. The General Counsel moved to intervene on March 16, 1993, and on April 7 the Defendants moved for a stay. The Court denied the General Counsel's motion to intervene (which was affirmed by the Third Circuit) but granted the stay.

The Respondent, in agreement with the General Counsel and the Union, notes the potential for conflicting opinions if the Section 302 issue is decided by the Board. The Respondent further contends that as the federal district courts are given primary jurisdiction to decide Section 302 cases, this matter ought to be held in abeyance until such time as the District Court enters judgment. The Respondent further contends that only through the discovery available under the Federal Rules of Civil Procedure will there be sufficient facts developed to decide the Section 302 issue.

The Respondent contends here that Section 302 is not an issue, because it had the right to withhold payments to the committeemen as a means of economic pressure. Counsel for the General Counsel maintains that she has the burden of proving no violation of Section 302, since, if the payments are found to have been unlawfully withheld, the Board must decide whether the remedial order would cause the parties to violate Section 302. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985).

I believe that payments to the chairmen and full-time committee men raise a serious issue under Section 302. Even if benign, Articles 4.6 and 4.7 shift the financial responsibility for certain full-time union officials from the Union to the Respondent

² Case 1:92-CV-1854 (M.D. Pa.).

Nevertheless, because I conclude that the payments under these articles are facially violative of Sections 8(a)(3) and 8(b)(2), whether they also may violate Section 302 need not be decided.

Therefore the Respondent's motion to stay is denied.

2. The Positions of the Parties.

The General Counsel and Charging Party contend that payment to the chairmen and full-time committeemen under Articles 4.6 and 4.7 is an established term and condition of employment. Therefore, the Respondent could not unilaterally withdraw payment; that is, the Respondent could not change this term absent bargaining to impasse about the proposed change.

The Respondent argues its right to withhold the payments from several angles, but all are based on the initial proposition that the payments were not an established term or condition of employment because they do not involve the employer/employee relationship. It argues, for instance, that the Union's in-plant campaign was unprotected and therefore such could be met by withholding what amounts to \$1.8 million per year subsidy to the Union. The Respondent also argues that since the Union withdrew participation in the Employee Satisfaction Program and joint training, both of which required participation of some committeemen and thus formed some part of the reason for paying them, it could withhold the payments. And it is argued that stopping committeemen pay was an economic weapon intended to bring the contract dispute to a resolution. Such was a tactic it had the right to pursue.

Since I conclude that the General Counsel is seeking to enforce an unlawful term or condition of employment, the Respondent's several other defenses need not be considered.

3. Illegality of Extra Pay to Chairmen and Full-time Committeemen.

In *Teamsters Union Local No. 293, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* (R.L. Lipton Distributing

Co., Inc.), 311 NLRB 538 (1993) the Board held the following contract clause violative of Sections 8(a)(3) and 8(b)(2) and found the respondent union in violation of Section 8(b)(1)(A) and (2) by maintaining and enforcing it:

The Shop Steward shall be paid, in addition to his regular rate of pay, at the rate per hour (based on forty (40) hours per week) of:

\$.45 per hour

The Board found that such additional payment was a form of superseniority presumptively unlawful under *Dairylea Cooperative*, 219 NLRB 656 (1975), *enfd.* 531 F.2d 1162 (2d Cir. 1976). Said the Board:

The contractual provision requiring employers to pay union shop stewards an additional wage of 45 cents per hour on its face provides a monetary reward for service as a union agent within the plant, so it plainly has a tendency to encourage union activity. Because only stewards receive these additional payments, we find that they interfere with the unit employees' Section 7 right to refrain from engaging in union activities in violation of Section 8(b)(1)(A). 311 NLRB at 539.

The Board rejected the argument that as the contract was negotiated more than 6 months before the charge was filed, Section 10(b) was a bar. This was a continuing violation. The Board also rejected arguments that one did not have to be a union member to be a steward or that the doctrine of laches applied.

Anti-docking clauses, such as that applicable here for the stewards and part-time committeemen when engaged in handling grievances, are permissible. *E.g., Axelson, Inc.*, 234 NLRB 414, *enfd.* 599 F.2d 91 (5th Cir. 1976). However, it is not permissible under the Act to negotiate a contract clause whereby an employer agrees to pay some specified extra sum to employees because they act as union agents.

I reject the General Counsel's contention that the additional 6 hours is not unlawful because it "was bargained for as a term and condition of employment and applied to individuals who otherwise lost all overtime possibilities when they became full-time committee men and grievance committee chairmen." (G. C. Supplemental Brief, 10, n.3) The pay clause in *Lipton* was also agreed to by the parties.

Even if the lost overtime possibilities was a basis for distinguishing *Lipton*, which I reject, the testimony of Weygand establishes that the payments are made regardless of whether production employees work overtime. In fact, the Union had been discouraging its members from working overtime. Nor is there evidence of a nexus between overtime worked by production employees and the extra pay. If the Union believes there is some policy why the chairmen full-time committeemen ought to be paid extra, then the Union must undertake to make the payments. The employer cannot agree to do so.

Finally, it is undisputed that only members in good standing can be elected chairmen and full-time committeemen. Such necessarily excludes those bargaining unit employees who crossed the picket line and were expelled from the Union for doing so. Granting a preferential benefit to be enjoyed only by individuals who remain members of the Union and excluding those who exercised their Section 7 right to return to work is unquestionably discriminatory. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

By both the unilateral change allegation and the refusal to recognize allegation, the General Counsel seeks to require the Respondent to enforce Articles 4.6 and 4.7 of the expired Central Agreement. The Board will not find a violation of Section 8(a)(5) where the employer refuses to provide a benefit which has an unlawful disparate impact on employees. *Mead Packaging*, 273 NLRB 1451 (1985) (overruled to the extent inconsistent on another issue in *Radio and Television Broadcast Engineers Union, Local 1212, IBEW, AFL-CIO (WPIX Inc.)* 288 NLRB 374 (1988)). Where a unilateral change is required by law, as is the case here because enforcement would continue to be a violation

of the law, then there can be no finding of a Section 8(a)(5) violation. *Murphy Oil USA, Inc.*, 286 NLRB 1039 (1987).

In her brief, Counsel for the General Counsel seems to suggest that even if the 6 hours bonus is impermissible, the rest of the pay commitment in Articles 4.6 and 4.7 could not lawfully be withdrawn. I do not believe that the illegality of this term can be cured simply by ordering removal of the excess pay provision, leaving the rest of the compensation package intact. To decide here that the Respondent could unilaterally withdraw payment of the bonus but had to abide by the rest of Articles 4.6 and 4.7 would be tantamount to the Board writing a contract provision to which the parties have not agreed. It is not the prerogative of the Board to set terms and conditions of employment for the parties. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The term of employment to which the parties agreed and under which they have operated was unlawful under the Act. It therefore cannot be enforced through a refusal to bargain proceeding, notwithstanding that the parties might be able to design a lawful method of compensating full-time committeemen.

Furthermore, excising the bonus provision from the compensation package for chairmen and full-time committeemen would not cure the fact that bargaining unit employees who have been expelled from the Union for crossing the picket line are ineligible for these positions.

Therefore, I shall recommend dismissal of these complaints. In doing so, I reiterate that stewards and part-time committeemen continued to handle grievances until the recent strike, and the Respondent offered to recognize the chairmen and full-time committeemen if they would apply for leaves of absence under Article 14.10.

On the above findings of fact and conclusions of law and on the entire record in this matter, I hereby issue the following recommended³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall,

ORDER

The complaints in Cases 33-CA-9990 and 33-CA-10033
are dismissed in their entirety.

Dated at Washington, D.C.
January 31, 1995

James L. Rose
Administrative Law Judge

as provided in Sec. 102.48 of the Rules, be adopted by the Board and all
objections to them shall be deemed waived for all purposes.

No. 96-1925

Supreme Court, U.S.
FILED
AUG 6 1997

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC.,

v.

Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**RESPONDENTS BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
<i>BASF Wyandotte Corp. v. Chemical Workers Local 227</i> , 791 F.2d 1046 (2d Cir. 1986)	<i>passim</i>
<i>Caterpillar Tractor Co.</i> , 2 War Labor Rep. 75 (1942)	3
<i>CWA v. Bell Atlantic</i> , 670 F. Supp. 416 (D.D.C. 1987)	5
<i>Herrera v. UAW</i> , 73 F.3d 1056 (10th Cir. 1996) ..	7
<i>Herrera v. UAW</i> , 858 F. Supp. 1529 (D. Kan. 1994)	7
<i>IBEW v. National Fuel Gas</i> , 16 Employee Benefits Cases (BNA) 2018 (W.D.N.Y. 1993)	5
<i>International UAW v. CTS Corp.</i> , 783 F. Supp. 390 (N.D. Ind. 1992)	5
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	6-7
<i>National Fuel</i> , 308 N.L.R.B. 841 (1992)	5
<i>Reinforcing Iron Workers v. Bechtel Power</i> , 634 F.2d 258 (6th Cir. 1981)	10
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U.S. 384 (1951)	12
<i>Toth v. USX</i> , 883 F.2d 1297 (7th Cir. 1989), <i>cert. denied</i> , 493 U.S. 994 (1989)	7, 8, 9
<i>Trailways Lines v. Trailways Inc. Joint Council</i> , 785 F.2d 101 (3rd Cir. 1986), <i>cert. denied</i> , 479 U.S. 932 (1986)	4, 5, 7, 9
<i>United States v. Kaye</i> , 556 F.2d 855 (7th Cir. 1977), <i>cert. denied</i> , 434 U.S. 921 (1977)	10
<i>United States v. Phillips</i> , 10 F.3d 1565 (11th Cir. 1994), <i>cert. denied</i> , 115 S. Ct. 1312 (1995)	7, 8, 9
STATUTES	
29 U.S.C. §§ 151 <i>et seq.</i>	5
29 U.S.C. § 186	<i>passim</i>
MISCELLANEOUS	
93 Cong. Rec. at 7683 (Sen. Ball)	12
Bureau of National Affairs, Basic Patterns in Collective Bargaining Contracts (1948)	2

TABLE OF AUTHORITIES—Continued

	Page
U.S. Department of Labor, <i>Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business</i> , Bulletin 1429-19 1980)....	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1925

CATERPILLAR, INC.,
v. *Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**RESPONDENTS BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI**

Respondents International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW) and its affiliated Local Union 786 (collectively "the Union") submit this brief in opposition to the petition for a writ of certiorari filed by Caterpillar, Inc. ("the Company"). The list of parties, opinions below, the basis for this Court's jurisdiction and the statutory provisions involved are correctly set out in the petition.

STATEMENT OF FACTS

For many years, the UAW has served as the collective bargaining representative of Caterpillar's hourly employees at plants throughout the country. The labor agreement

between Caterpillar and the UAW—like virtually every labor agreement to which the UAW is a party—includes a procedure for the resolution of employee grievances through various “steps” culminating, if necessary, in arbitration.

The Caterpillar/UAW labor agreement also establishes a “system of Union Representation for the processing and settlement of grievances.” C.A. App. 45. In the case of the York, Pennsylvania facility involved in this case, the Agreement provides for more than 100 union stewards “elected from among the employees under the supervision of each Foreman,” C.A. App. 77, and for a grievance committee consisting of nine committee members to be elected from zones which are defined in the agreement and a grievance committee chair to be “elected from among employees in the bargaining unit,” C.A. App. 46.

Since 1942, the labor agreements between Caterpillar and the UAW—like collective bargaining agreements throughout the industrial sector—have permitted employees elected to these various grievance processing positions to perform their representational functions during work hours without loss of pay.¹ These “no-docking” provisions were first included in the Caterpillar-UAW agreement in 1942 pursuant to a ruling by the War Labor Board which—noting that “[t]he practice of paying union representatives while they are handling grievances is very common in industry”—directed that “the [Caterpillar] con-

¹ As of 1947, when the Labor Management Relations Act was enacted, “no docking provisions in collective bargaining agreements were common, with approximately 40% of all industrial collective bargaining agreements containing such provisions.” *BASF Wyandotte Corp. v. Chemical Workers Local 227*, 791 F.2d 1046, 1050 (2d Cir. 1986), citing Bureau of National Affairs, *Basic Patterns in Collective Bargaining Contracts* 15:27 (1948). By 1980, the number of industrial agreements containing such provisions had grown to nearly two-thirds. U.S. Department of Labor, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business*, Bulletin 1425-19, Table 1, p. 32 (1980).

tract should provide for compensation of union representatives who lose time in handling grievances.” *Caterpillar Tractor Co.*, 2 War Labor Rep. 75, 95 (1942).

Prior to 1973, the committeemen, stewards and grievance chairmen were entitled to take time off as needed “without loss of pay for regularly scheduled hours to represent employees in the grievance procedure.” C.A. App. 276-277. As the volume and complexity of grievances increased, the grievance chairmen began *de facto* to devote full time to their grievance-related work with little or no time left for their regular production work. C.A. App. 257.

Beginning in the early 1970’s, the UAW and various companies in the agricultural implement industry agreed to define a limited number of union positions within each plant as *de jure* full-time positions.² Employees elected to such positions were, by contract, permitted to perform certain contractually-defined representational functions throughout the entire workday, during their term in elected office, without loss of pay.³ These agreements adopted the approach that had been followed universally in the automobile manufacturing industry since the early 1940’s.⁴

² The UAW negotiated such a provision with Deere and Company in 1971, C.A. App. 270; with Caterpillar in 1973, C.A. App. 264; and with J.I. Case Corp. in 1977, C.A. App. 408.

³ At the York plant, for example, the position of grievance chairman was defined as a full-time position. Caterpillar continued to pay the employee who was elected to that position his regular wages and benefits for time devoted to grievance processing, but not for time devoted to other tasks such as collective bargaining or internal union matters. C.A. App. 50. Caterpillar maintained the employee elected as chairman on its employment roles as an active employee and continued to treat him as an employee for various statutory purposes such as payment of FICA taxes. C.A. App. 705-07.

⁴ In 1941, the national agreement between the UAW and Ford Motor Co. provided that the chairmen of the bargaining committees

This system of as-needed and full-time paid leave functioned quite smoothly from 1973 through succeeding collective bargaining agreements and allowed Caterpillar employees to run for and perform the duties of grievance chair without loss of pay.⁵ But on October 30, 1992—in the wake of a national strike and deteriorating labor relations between the UAW and Caterpillar—Caterpillar's Director of Labor Relations, in an avowed effort to "put economic pressure on the union," repudiated "until a new agreement is reached" its obligation to pay the chairman his regular wages for the time spent during the work day performing his representational duties. C.A. App. 144.

The Union filed unfair labor practice charges with the National Labor Relations Board contesting Caterpillar's action. The next day Caterpillar commenced this unusual declaratory judgment proceeding in which it sought a ruling that for the preceding twenty years the Company had been engaged in criminal behavior, by paying the regular wages of the employee elected to serve as grievance chair for the time that individual spent during the regular work day performing the grievance-processing duties spelled out in the contract.

The district court, bound by the decision of a divided panel of the Third Circuit in *Trailways Lines v. Trailways Inc. Joint Council*, 785 F.2d 101 (3rd Cir. 1986), *cert. denied*, 479 U.S. 932 (1986), ruled for Caterpillar. After

at each facility "shall devote their full time to their duties as such." C.A. App. 295. The 1941 agreement between the UAW and General Motors and the 1943 agreement between the UAW and Chrysler similarly provided for full time leave for the chairmen at each facility. C.A. App. 335, 376.

⁵ For example, the grievance chair at Caterpillar's York facility when the events that give rise to this action transpired had worked as a regular Caterpillar hourly employee for more than twenty-one years before being elected to serve as chair, and was in the second year of a three year term of office. Unless reelected, he returns to regular hourly production work when his term expires.

oral argument before a panel of the Third Circuit, the court of appeals, *sua sponte*, set the case for consideration *en banc*. By a vote of 8-3, the Third Circuit decided to overrule *Trailways*, to reverse the district court and to uphold the legality of the "no-docking" provision.

ARGUMENT

The question posed here is whether § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), prohibits an employer and a union from agreeing, in arms length collective bargaining, to permit employees elected to a union office to devote some or all of their working hours to discharging the duties of that office without loss of pay or benefits. Such "no-docking" provisions have been an integral part of the system of labor relations in this country since the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, was enacted over sixty years ago. And with the decision below, four circuits have now held that such provisions are, indeed, lawful under § 302. No court of appeals has reached a contrary conclusion.⁶

Thus, while the lower court law may be vexatious to petitioner Caterpillar, given its current desire "to try to gain leverage in [a] protracted labor dispute," Pet. at 2, it simply is not true that the question posed here "has vexed the lower courts" or "produced inter-circuit disagreement if not disarray." Pet. at 8. Nor is there any basis in reality to Caterpillar's suggestion that the decision below marks "a fundamental change in the federal policy favoring labor-management independence." Pet. at 9. Thus, all of Caterpillar's reasons for a grant of its certiorari petition are entirely without substance.

⁶ The decisions of the district courts, and of the National Labor Relations Board, are to the same effect. See *IBEW v. National Fuel Gas*, 16 Employee Benefits Cases (BNA) 2018 (W.D.N.Y. 1993); *CWA v. Bell Atlantic*, 670 F. Supp. 416 (D.D.C. 1987); *International UAW v. CTS Corp.*, 783 F. Supp. 390 (N.D. Ind. 1992); *National Fuel*, 308 NLRB 841 (1992).

1. LMRA § 302(a) broadly prohibits any payments by an employer to "any representative of any of his employees." Section 302(c)(1), however, recognizes that an individual may, at one and the same time, be *both* a union representative and an "employee or former employee" of the employer, and § 302(c)(1) saves from illegality payments to such individuals made "as compensation for or by reason of the [individual's] service as an employee." 29 U.S.C. § 186(c)(1). It is the meaning of that section which has been at issue in the no-docking cases.

(a) The first court to "conclude that [a] no-docking provision . . . was not unlawful" was the Second Circuit in *BASF Wyandotte v. Local 227*, 791 F.2d 1046, 1054 (2d Cir. 1986). Writing for the Court in that case, Judge Kearse interpreted 302(c)(1) as follows:

It appears that in using the alternative formulations "for" and "by reason of" Congress intended to cover two general categories of employee compensation: (1) wages, i.e. sums paid to an employee specifically for the work he performs, and (2) compensation occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work. The latter category would include such employee "fringe" benefits as vacation pay, sick pay, paid leave of jury duty or military service, pension benefits, and the like. [*Id.* at 1049]

And, Judge Kearse went on to conclude that a payment of wages pursuant to a no-docking clause for time spent tending to union duties, "is not, in our view, different in kind from the employer's granting of such benefits as sick leave, military leave, or jury leave." *Id.*

In *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986), a case involving the same employer and "facts almost identical" to those before the Second Circuit, *id.* at 855, the Fifth Circuit likewise "reject[ed]" the company's position that the privileges at issue are

illegal under § 302," *id.* at 856. The Fifth Circuit's decision echoes the Second Circuit's analysis of both the statutory language and the legislative history, as even Caterpillar concedes. Pet. at 12.

Just last year, in *Herrera v. UAW*, 73 F.3d 1056 (10th Cir. 1996), the Tenth Circuit was content to decide the no-docking issue by "adopt[ing] the analysis . . . of the district court," *id.* at 1057, which had held that "the law is clear that payments to union officials for time spent on union business does not violate [section 302]." *Herrera v. UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994).

Thus, in upholding the agreement at issue here, and in overruling its earlier *Trailways* decision, the Third Circuit brought its law in line with the law of the other courts of appeals.

(b) Lacking even a single decision invalidating a no-docking provision, Caterpillar attempts to build its case of appellate-court discord out of two decisions arising outside of the no-docking clause context. See Pet. at 12-14, discussing *Toth v. USX*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989); *United States v. Phillips*, 10 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1312 (1995). But the courts in those cases—while finding § 302 violations on facts which, as Caterpillar acknowledges "approached outright bribery," Pet. at 25—made plain their *agreement* with the holding of *BASF* and its progeny with respect to the lawfulness of no-docking provisions. Indeed, the court below relied on *Toth* and *Phillips* to support its conclusion that the no-docking provision at issue here is protected by § 302 (c)(1). Pet. App. at 11a. Thus, on the question presented in this case, *Toth* and *Phillips* are in line with the decisions of the Second, Fifth and Tenth Circuits as well as with the instant decision of the Third Circuit.

Toth and *Phillips* both arose from schemes in which full-time union officials, in the course of negotiating a contract on behalf of the union with their former em-

ployer, exacted from that employer a side deal, not incorporated in the collective bargaining agreement or otherwise revealed to the union or the covered employees, whereby the negotiators would receive up to thirty years of retroactive pension credits in the employer's pension plan. In *Toth*, the Seventh Circuit upheld the dismissal of an action brought by other former employees of the same employer seeking the same retroactive pension credits that had been granted to the union negotiators; in *Phillips* the Eleventh Circuit upheld the criminal conviction of two of those negotiators.

In reaching these conclusions, the *Toth* and *Phillips* courts made clear that the mere fact that union officials were earning pension credits from their former employer while serving in union office did not establish a legal wrong.

To the contrary, *Toth* states that "[o]ne obvious instance in which continuing payments constitute recompense of past service"—and hence are permitted by § 302(c)(1)—"is when those continuing payments were bargained for and formed part of a collective bargaining agreement." 883 F.2d at 1304. Citing *BASF*, the *Toth* Court explained that "all of the terms of employment for which unions bargain are properly deemed part of the compensation for which employees work." *Id.* But, said the *Toth* Court, in the case before it—and in contrast to the wage payments at issue in *BASF*—the pension credits were granted secretly and "not a[s] part of the bargained-for-collective bargaining agreement." *Id.* at 1305. For that reason, the *Toth* Court held that those pension credits "cannot qualify as 'compensation for or by reason of' former employment." *Id.*

Similarly, the Eleventh Circuit in *Phillips* indicated that payments to a former employee who had assumed a full-time union position would be lawful if "the employee had earned the full right to receive the benefits before going on a leave of absence to work for the union." 10 F.3d at 1575. In support of that statement the Eleventh Circuit

cited both the Second Circuit's and the Fifth Circuit's *BASF* decisions. The Eleventh Circuit went on to "agree with the Seventh Circuit [in *Toth*] that the payments akin to those in this case do not fall within the [§ 302(c)(1)] exception" because the employer had "ignored[d] the company's collective bargaining agreement . . . and secretly grant[ed] retroactive . . . pension benefits to a small number of the union's officials." *Id.* at 1576.⁷

Thus, far from casting doubt on the decisions upholding no-docking agreements, *Toth* and *Phillips* expressly reaffirm those holdings. And, as noted, the court below, in sustaining the agreement at issue here, expressly relied on both *Phillips* and *Toth* as well as on the Second, Fifth and Tenth Circuit decisions. Pet. App. at 11a, 9a.

(c) The discord that Caterpillar purports to discern in the appellate court law is thus one that has eluded the notice of the courts themselves. There is not even a hint in any of the decisions that any court has seen any inconsistency, let alone any conflict, in the circuits; to the contrary, every court has seen and treated the prior cases—with the exception of the now-overruled *Trailways* decision—as in line with each other.

Not surprisingly then, what Caterpillar claims to be a conflict is noting more than the variations in style and explanatory emphasis that invariably occur as different judges set about explaining the basis for reaching the same ultimate legal conclusion. What is determinative here is that every court has, indeed, reached the very same conclusion as to the lawfulness of no-docking provisions. On the theory of each and every one of the decisions which Caterpillar cites, Caterpillar's attack on its own collective bargaining agreement fails. There is thus nothing

⁷ Given its statement of "agree[ment]" with *Toth*, the *Phillips* Court undoubtedly would be surprised to learn, see Pet. at 14, that it "did not embrace" *Toth* but instead "rendered a persuasive opinion based on *Trailways*"—the one § 302(c)(1) case that the *Phillips* Court did not cite.

about the state of the law in this area to make this case worthy of this Court's attention.

2. At various points Caterpillar suggests that this case is not in the *BASF* line because here the employee elected as grievance chairman can, during the term of the office, devote full time to his union duties without loss of pay whereas in, e.g., *BASF*, the employees holding union office were permitted to spend only part of their time on union duties. On that basis, Caterpillar attempts to assimilate this case to *Reinforcing Iron Workers v. Bechtel Power*, 634 F.2d 258 (6th Cir. 1981), and *United States v. Kaye*, 556 F.2d 855 (7th Cir.) *cert. denied* 434 U.S. 921 (1977), which involved payments to "industry steward funds" which hired professional union representatives to perform various union tasks.

But in *Bechtel* and *Kaye* the payments were made to individuals who had *no* previous employment ties to the employer whatsoever. By definition, such payments to strangers to the employment relationship could not claim protection under § 302(c)(1) as "compensation for, or by reason of, service as an employee." *Bechtel* and *Kaye* thus stand for the unsurprising, and uncontroversial proposition—which the *BASF* cases reaffirm as well—that § 302(c)(1) does not "allow an employer simply to put a union official on its payroll while assigning him no work." *BASF v. Chemical Workers Local 227*, 791 F.2d at 1050; *see NLRB v. BASF*, 798 F.2d at 856 n.4. Here, as in those cases, there is "no merit in [the Company's] reliance on cases such as . . . *Bechtel*." 791 F.2d at 1054.

3. The court of appeals law, in other words, leaves Caterpillar no option but to argue that this case is in a class of one—unlike *Bechtel* and *Kaye* because the payments here were made to *bona fide* employees of the employer, but unlike *BASF* and its progeny because those employees are on full-time leave.

If correct, Caterpillar's contention would be self-defeating for it would reduce the importance of this case, and any conceivable claim on this Court's scarce time and re-

sources, to the vanishing point. But in fact, Caterpillar's attempt to draw a distinction in principle between this case and *BASF* is unsound.

Contrary to Caterpillar's contention, it is simply not true that § 302(c)(1) draws a distinction between part-time and full-time union offices and requires that "union recipients of employer payments [must] be *current bona fide employees* of the employer." Pet. at 17 (emphasis in the original). To the contrary, that section in terms permits payments to either a current employee or a "former employee" who is a current union official so long as the payment is "by reason of" the individual's prior or contemporaneous service as an employee. And given that, as the court below stated, "the nature of the absences and the payments made by the employer owing them is the same" regardless of the number of hours an employee spends performing union work, "it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible while granting a single employee eight hours per day of that same leave is a federal crime." Pet. at 12a, 10a.

4. Caterpillar's claim that the decision below introduces a "fundamental change in federal labor policy" fares no better. Pet. 19-24. All that the court here did was to *uphold* a collective bargaining agreement provision to which Caterpillar has been a party since 1973 and which other companies have adopted since at least the early 1940's. It is difficult to understand how that can amount to a change in labor policy at all.

What Caterpillar does, in the guise of arguing that the decision below "fundamental[ly] change[s]" labor policy, is to launch into a lengthy policy disagreement with the court of appeals' decision. This is not the time or place to brief the merits of the decision below. Three points are worth brief mention, however.

First, Caterpillar's policy discussion makes no attempt to deal with the language of the statute or to proffer an

interpretation of the statutory text which would condemn the payments at issue here while at the same time permitting the wage payments Caterpillar continues to make to part-time union officials who spend part of their working day on leave to perform union business.

Second, Caterpillar likewise fails to do business with the legislative history of § 302 which was reviewed at length by the Second Circuit in *BASF* and which shows that the Congress that enacted that section was "well aware of the widespread use of no-docking provisions," 791 F.2d at 1051, and "manifested [an] intent . . . to increase the availability of expanded no-docking provisions," *id.* at 1053. Instead, Caterpillar relies on snippets of legislative history taken from the *opponents* of § 302 decrying the proposed section's breadth. *See* Pet. at 21. Such statements are notoriously *unreliable* guides to statutory interpretation. And, that is especially true where, as here, the *proponents* of the statute stated a far more limited intent. *See, e.g.*, 93 Cong. Rec. at 7683 (Sen. Ball). *See also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

Third and finally, for all its talk about "the independence of labor from management," "the policy of financial self-reliance," "prevent[ing] unions from developing addictions to employer subsidies," and the like, Pet. at 19, Caterpillar nowhere explains why wage payments to full-time union officers are more threatening to these policies than payments to part-time union officers. Caterpillar's silence in this regard is pregnant with significance.

When all is said and done, then, the position that Caterpillar espouses in this case does not rest on any foundation in the law but on Caterpillar's admitted desire "to try to gain leverage in the protracted labor dispute" between the Company and the UAW. Pet. at 2. Nothing about this *sui generis* litigation merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATERPILLAR INC., *Petitioner*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA and its affiliated LOCAL UNION 786,
Respondents

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit**

**PETITIONER'S REPLY BRIEF IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI**

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**PETITIONER'S REPLY BRIEF IN SUPPORT
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The Brief in Opposition highlights the fundamental issue that employers and unions need this Court to address: When, if ever, may an employer pay a full-time union official for being a full-time union official? Although section 302(c)(1) of the Labor Management Relations Act allows an employer to pay a union official only for his "service as an employee," 29 U.S.C. § 186(c)(1), the Respondents (hereinafter "the Union") and a majority of the Third Circuit believe an employer may pay the salary of an individual who entirely leaves his job in order to serve, perhaps for years, as a full-time union official.

The Union concedes that the determinative issue turns on the interpretation of this substantive test: whether payments are "by reason of . . . service as an employee." Resp. at 6. Though making that concession, the Union tries to conceal the lower court disarray concerning the meaning of that statutory requirement by limiting every relevant precedent to its facts.¹ Nowhere in its brief, however, does the Union deny that the lower courts have adopted four different interpretations of that test. Rather, the Union dismisses the fundamental disagreement as mere "variations in style and explanatory emphasis." Resp. at 9.²

¹ For example, the Union implies that the Eleventh Circuit found the benefits at issue in *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), unlawful because they were granted *secretly* outside the *collective bargaining agreement*. Resp. at 7-8, 9. Those factors were relevant, however, because they showed that the right to the benefits had not vested before the employee left his regular job, 19 F.3d at 1575—a requirement deriving from *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir. 1986).

² The disagreement is more than ornamental. To rely on *Phillips*, the Third Circuit had to formulate the fiction that wage payments to union officials are a vested benefit purchased by em-

(continued...)

Despite the Union's obfuscation, the Third Circuit's decision perverts, rather than follows, existing precedent and dangerously expands the scope of permissible employer subsidies to unions. Review in this case is crucial because the Third Circuit has now so attenuated and trivialized the substantive test of section 302(c)(1) that, as Amicus Council on Labor Law Equality notes, the statutory exception now threatens to "swallow[]" the ban on employer payments itself. See Br. at 11. It warrants repeating again here: This case is the first in which any court of appeals has ever approved the payment of full-time wages to full-time union officials who are no longer employed by the payor and who perform absolutely no work for it.

1. Relying on *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046 (2d Cir. 1986), the Union continues labor's crusade to eviscerate the phrase "by reason of . . . service as an employee." In its brief to the Second Circuit in *BASF*, the union there argued that under section 302(c)(1) the only question was whether the union officials receiving payments are "*bona fide* employees." Brief of Appellee at 9, *BASF*, 791 F.2d 1046 (No. 85-7214). But that inquiry is just the starting point. Determining that a paid union official is "also an employee or former employee," 29 U.S.C. § 186(c)(1), merely establishes that the *substantive* test of section 302(c)(1) may be applied to the payments. Under that test, payments to a union official who is also an employee or former employee are legal *if and only if* they are for his "service as an employee" rather than his service as a union official. See Pet. at 11 n.12.

² (...continued)

employees with a wage cut. In citing *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir. 1989), the Third Circuit in this case dispensed with *Toth's* own warning that payments had to be commensurate with past service. *Id.* at 1305.

Despite the foregoing, the Second Circuit, accepting the union's argument in that case, asked only the preliminary question in *BASF* and disregarded the *substantive* test. While the Second Circuit's oversight was of limited import given the narrow facts and unique statutory considerations of "no-docking" policies applicable to active workers,³ the Third Circuit's decision below seriously compounds that error by effectively eliminating the substantive test even when dealing with full-time officials who were, at most, former employees at some point in the past.

2. The Union attempts to conceal this compound error by insisting that this case involves just another type of "no-docking" policy. The Union and a majority of the Third Circuit perceive no difference between allowing a regular worker, without loss of pay, to take some time during a workday to perform a union activity and, in contrast, providing wages and benefits to a full-time union official who performs absolutely no work for the employer. For the Union and the Third Circuit majority, the requirement that the pay be for "service as an *employee*" is satisfied in the latter instance by the mere fact that the union official happened to have once worked for the employer. On that view, any difference between a "no-docking" policy and indefinite paid leave is merely a matter of degree. Indeed, the Union describes *both* arrangements as "no-docking" policies, even though what an employer is supposedly not "docking"

³ Section 302 literally prohibits "no-docking" policies, and although another provision of federal labor law contemplates a very narrow "no-docking" rule, that provision applies only to *employees*. 29 U.S.C. § 158(a)(2). Some courts have relied on the latter provision to carve a limited exception into section 302 for "no-docking" policies applicable to current employees. See *Employees' Indep. Union v. Wyman-Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970) (upholding policy allowing attendance at monthly grievance meetings without loss of pay).

in the latter situation is the union official's *entire*, full-time salary, potentially continuing over a period of years and unaccompanied by any kind of ongoing "service as an employee."

Other courts, however, do not accept the Union's conflation of "no-docking" policies and indefinite paid leave. In approving a "no-docking" arrangement in *BASF*, the Second Circuit observed that such arrangements were by their very nature applicable *only* to current employees, 791 F.2d at 1049 n.1. They are not equivalent to "simply put[ting] a union official on the . . . payroll while assigning him no work," because such an official would not be a bona fide employee within the meaning of the statute. *Id.* at 1050; accord *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986) (expressly disclaiming legality of wage payments to full-time union officials who perform no work for employer); *Toth*, 883 F.2d at 1305 (same). True, the Second Circuit did not specifically address whether it would approve of *leaving* a union official on an employer's payroll once he had stopped performing any work for the employer, but the court clearly would not have categorized that practice as a "no-docking" policy. *See id.* at 1049 n.1.⁴

In short, the Third Circuit is *not* just bringing itself into line with other precedent, as the Union suggests.

⁴ Likewise, the Departments of Justice and Labor recognize that a "no-docking" policy presents different considerations from indefinite paid leave. Below, they argued that payments to a union official who is a former employee would be considered lawful *if* the official is elected from the bargaining unit, and the payments are commensurate with his former position and are limited to his role in the grievance process. *See Pet.* at 16-17. The United States also sought "close scrutiny" if the official negotiates the payments or if he had not been a long-time employee and probably will not return to regular work. *Id.* at 17.

3. Far from merely seeking to "gain leverage" in a labor dispute, as the Union suggests, Caterpillar initiated this suit only *after* the Union demanded that it pay union officials for even *more* hours of union activity at even *higher* rates of pay. Petitioner asks this question on behalf of itself and other employers: Where is the line to be drawn? If Congress had wanted to prohibit only actual instances of bribery, extortion, and corruption, it would not have enacted a *malum prohibitum* statute broadly forbidding conflicts of interest. Did Congress really determine that some period of former employment, however brief, cleanses *all* bargained-for payments, whatever the amount, yet simultaneously believed that *all* payments to a union official who has not been employed by the payor, regardless of circumstance, are corruptive? Is a stranger more likely to be unduly influenced or his union become more dependent than a former employee and his union? The line proposed by the Union and accepted by the Third Circuit majority is simply not rational.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 96-1925

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IN THE
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CATERPILLAR INC.,
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v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF AMICUS CURIAE OF THE
COUNCIL ON LABOR LAW EQUALITY
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether Section 302(c)(1) of the LMRA exempts employer payments of wages and benefits to full-time union officials from the otherwise criminal proscriptions of Section 302(a) because those payments are negotiated during collective bargaining and are "by reason of" the union officials' past service with the employer?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
ARGUMENT	3
I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EM- PLOYER TO PAY FULL-TIME UNION OFFI- CIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING	7
II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c) (1) EX- CEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SEC- TION 302(a)	10
III. LABOR AND MANAGEMENT REQUIRE UNI- FORM FEDERAL GUIDANCE TO INTER- PRET SECTION 302(c) (1) IN LIGHT OF THE CHANGED LEGAL LANDSCAPE IN THE WORKPLACE	14
CONCLUSION	15

TABLE OF AUTHORITIES

<i>Federal Cases</i>	Page
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959)	3, 8
<i>BASF Wyandotte Corp. v. Local 227</i> , 791 F.2d 1046 (2d Cir. 1986)	5, 12, 13
<i>Caterpillar Inc. v. United Auto. Workers of Am.</i> , 107 F.3d 1052 (3d Cir. 1997)	<i>passim</i>
<i>Communications Workers of Am. v. Bell Atl. Network Servs., Inc.</i> , 670 F. Supp. 416 (D.D.C. 1987)	5
<i>Employees' Independent Union v. Wyman Gordon Co.</i> , 314 F. Supp. 458 (N.D. Ill. 1970)	5
<i>Herron v. International Union, UAW</i> , 73 F.3d 1056 (10th Cir. 1996), <i>aff'g & adopting district court's decision</i> , 858 F. Supp. 1529 (D. Kan. 1994)	5
<i>International Bhd. of Elec. Workers Local 2514 v. National Fuel Distribution Corp.</i> , 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993)	11
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	5
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947)	4
<i>Reinforcing Iron Workers Local Union #26 v. Bechtel Power Corp.</i> , 634 F.2d 258 (6th Cir. 1981)	5, 13
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), <i>cert. denied</i> , 493 U.S. 994 (1989)	<i>passim</i>
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union</i> , 785 F.2d 101 (3d Cir. 1986)	5, 7
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir. 1994), <i>cert. denied</i> , 115 S. Ct. 1312 (1995)	<i>passim</i>
 <i>Statutes and Legislative Materials</i>	
93 Cong. Rec. 4704 (1947)	8
93 Cong. Rec. 4805 (1947)	8, 9
93 Cong. Rec. 4877 (1947)	8
II NLRB Legislative History of the Labor-Management Relations Act 1305 (1948)	9

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 741, 86th Cong., 1st Sess., <i>reprinted in</i> 1959 U.S.C.C.A.N. 2424, 2469	9
S. Rep. No. 187, 86th Cong., 1st Sess., <i>reprinted in</i> 1959 U.S.C.C.A.N. 2318, 2329	9
S. 1126, 80th Cong., 1st Sess. (1947)	7
Section 302(a) of the Labor-Management Relations Act, 29 U.S.C. 186(a)	<i>passim</i>
Section 302(c) (1) of the Labor-Management Relations Act, 29 U.S.C. § 186(c) (1)	<i>passim</i>
Section 302(c) (5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c) (5)	14
Section 302(d) of the Labor-Management Relations Act, 29 U.S.C. § 186(d)	2
Section 8(a) (2) of the National Labor Relations Act, 29 U.S.C. § 158(a) (2)	5
Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth	5
The Family and Medical Leave Act, 29 U.S.C. §§ 2601-54	14
The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 August 21, 1996, 110 Stat. 1936	14
The Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151-87	3
The Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531	9

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BRIEF AMICUS CURIAE OF THE
COUNCIL ON LABOR LAW EQUALITY
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

COLLE is a national association of employers formed in 1981 to provide legal support to the business community through the filing of *amicus curiae* briefs with the courts and the National Labor Relations Board on those issues arising under the federal labor statutes which affect a broad cross-section of industry.* COLLE was formed to

* This brief is being submitted by the Council on Labor Law Equality ("COLLE"), as *amicus curiae* in support of petitioner. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* COLLE certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than COLLE and their counsel made any monetary contribution to the preparation or submission of this brief.

create a specialized and continuing business community resource to maintain a balanced approach in the formulation and interpretation of national labor policy. Over the years, COLLE has participated as an *amicus curiae* in cases of major significance before the National Labor Relations Board and the federal courts, including the Supreme Court. See, e.g., *International Bhd. of Elec. Workers v. Colorado-Ute Elec. Ass'n, Inc.*, No. 91-1284 (1992); *Lechmere, Inc. v. NLRB*, No. 90-970 (1992); *Building & Constr. Trades Council v. Altemose Constr. Co.*, No. 85-82 (1986); *NLRB v. Transportation Management Corp.*, No. 82-168 (1983).

This case involves employer payments to full-time union representatives pursuant to Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186. The resolution of the issues raised in this case is significant for COLLE, its member, Caterpillar Inc., as well as its other member companies, because the Third Circuit *en banc* fashioned an overly permissive interpretation of Section 302 that permits employer payments to full-time union officials "by reason of" the union officials' past service with the employer and because those payments were negotiated in collective bargaining. *Caterpillar Inc. v. United Auto Workers of Am.*, 107 F.3d 1052 (3d Cir. 1997). None of the other Courts of Appeals that has interpreted the Section 302(c)(1) exemption—including the Second, Fifth, Sixth, Seventh, and Eleventh Circuits—has expanded the exemption to this extent.

An equally important concern is that under Section 302(d) of the LMRA, 29 U.S.C. § 186(d), violation of Section 302(a) subjects employers to criminal penalties. Cf., *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (imposing criminal penalties against union officials for violating Section 302(a)), *cert. denied*, 115 S. Ct. 1312 (1995); *Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) ("The proper remedy for the situation if bribery was indeed involved is prosecution of the company and union officials at fault, not judicial approval of the

bribery scheme"), *cert. denied*, 493 U.S. 994 (1989). In light of the vastly different interpretations that the courts have given to the Section 302(c)(1) exception, employers have no uniform federal guidance regarding their potential criminal exposure.

It is COLLE's position that an employer's payment of wages to full-time union officials who perform no work for the employer is contrary to the plain language of Section 302(a). Because Caterpillar's payments were not generally applicable to former employees "as compensation for, or by reason of" their past service with the employer, these payments could not have been saved from illegality under the Section 302(c)(1) exemption. In addition, regardless of a union's strength during collective bargaining, activity that is unlawful cannot be legitimized simply because an employer "agreed" to it in negotiations.

ARGUMENT

Fifty years ago, Congress passed the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151-87, heralding in a new era of labor management relations. In addition to setting forth the rights of unions, employers, and employees, the law also delineated the boundaries of lawful and unlawful payment arrangements between employers and unions in Section 302 of the Act. 29 U.S.C. § 186.

Section 302 arose out of legislative concern that employer payments for pension and welfare benefits often were diverted to the benefit and personal use of union leaders or as resources to be used during a strike. Congress enacted Section 302 as part of a comprehensive reform of federal labor law and policy, to deal specifically with practices inimical to the integrity of collective bargaining, and to prevent practices which, if unchecked, could lead to bribery and extortion by union officials or which, by collusion, might impair the impartiality of employee representation. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). Congress therefore made it unlawful, except in very narrow circumstances, for employers to pay money or any other thing of value to union officials:

It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce; . . .

29 U.S.C. § 186. Based simply on a plain reading of Section 302(a), all employer payments to union officials are unlawful.

Section 302(c), however, contains several exceptions to the prohibitions found under Section 302(a). The exception at issue in this case is found in Section 302(c)(1). In relevant part, it provides that it is not unlawful for an employer to pay money or other thing of value to any representative of his employees who is a present or former employee "as compensation for, or by reason of, his service as an employee of such employer[.]"

29 U.S.C. § 186(c)(1). Section 302(c)(1) does not contain an exception that permits employers to use the collective bargaining process to make payments that would not otherwise be permitted under Section 302. It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947); *Caterpillar v. United Auto. Workers of Am.*, 107 F.3d 1052, 1058 (3d Cir. 1997) (dissent).

For decades, unions have tested the boundaries of the criminal statute by seeking to negotiate various payment arrangements, which employers have challenged in the courts. In general, the courts have upheld payment arrangements where employees take a few hours out of the workday or workweek to perform work for the union.

These agreements are known as "no-docking" arrangements and they are not being challenged here.¹

The courts have rejected arrangements, however, where:

- payments are made to individuals who are not employed by the employer, *see e.g., Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (because industry steward could not be characterized as an employee of Bechtel, any contributions by Bechtel to the industry steward fund would violate the terms of Section 302(a));
- payments were not compensation for or by reason of the employees' service to the employer, *see, e.g., Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986) (ruling unlawful union's attempt to have employer make contributions to pension trust funds on behalf of employees who took leaves of absence to accept full-time positions with the union or its parent international because contributions were not made for past service to the employer);

¹ As the Third Circuit observed, "no-docking arrangements have been consistently upheld by the courts as not in violation of § 302 because the employer's payment is to current employees as compensation for, or by reason of, their service to the employer." *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); *Herron v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970). Such practices are also permitted under Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) ("Provided, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay") and Section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth ("Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time. . .").

- the union sought retroactive pension service credit for former employees on leave working full time for the union; *see, e.g., Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) (Section 302 (c)(1) does not exempt an employer's leave of absence policy awarding retroactive pension service credit to former employees who were on leave working full-time as union officials because payments are not made for past services rendered by the former employee while an employee), *cert. denied*, 493 U.S. 994 (1989); and,
- the employer agreed to extend its leave of absence policy to enable union leaders to obtain company provided pensions even though they had been working full time for years as a union official, *see, e.g., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (affirming imposition of criminal penalties against union officials who obtained in collective bargaining retroactive extensions of their leave of absence from the employer so as to qualify them for employer-provided pensions, even though they had not worked for the employer for many years), *cert. denied*, 115 S. Ct. 1312 (1995).

In each of these cases, the union's arrangement fell outside the Section 302(c)(1) exemption.

In the present litigation, the UAW, during collective bargaining, sought to have Caterpillar pay the wages and fringe benefits of full-time union officials who performed *no* services at all for Caterpillar. The union officials were on leave of absence and would be paid at the same rate as when they last worked on the factory floor. *Caterpillar*, 107 F.3d at 1053. They conducted business from the union hall, performed no duties directly for Caterpillar, and were not under the control of Caterpillar except for time reporting services. *Id.* The Union contended that because the employees on leave for union business worked for Caterpillar in the past, the payments satisfied the exception under Section 302(c)(1) for payments made "by reason of" the employees' past service to Caterpillar. This exception for past service has come to be known as the

"by reason of" exception to Section 302. The Third Circuit overruled its prior precedent in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986), and became the first court to hold that Section 302(a) was not violated by an agreement that placed full-time union officials in a *paid* leave of absence status. In addition, the Third Circuit found significant the fact that Caterpillar and the union agreed to this arrangement as part of the collective bargaining process.

COLLE supports the petition for certiorari in this case for several reasons. First, its employer members suffer potential exposure to criminal penalties for violations of Section 302(a). Second, the collective bargaining process will be facilitated by Supreme Court guidance clearly defining the scope of the Section 302(c)(1) exemption. Third, the lack of uniformity among the circuits regarding what types of payments from employers to union officials are lawful under Section 302 of the LMRA and what the proper test should be for interpreting the Section 302(c)(1) exemption cause significant uncertainties for employers with multi-state collective bargaining agreements. The same collective bargaining provision may be lawful in one jurisdiction and unlawful in another.

I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EMPLOYER TO PAY FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING

Section 302 is a conflict-of-interest statute that was designed to eliminate practices that have the potential for corrupting the labor movement. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d at 1057 (majority opinion) and 1059 (dissent); *see United States v. Phillips*, 19 F.3d at 1574. As reflected in the legislative history, Section 302 was introduced on the floor of the Senate as a proposed amendment to S. 1126, 80th Cong., 1st Sess.

(1947), a bill to amend the NLRA as originally enacted in 1935. The proposed amendment (i.e., Section 302) read, in pertinent part, as follows:

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee of such employer, as compensation for, or by reason of, his services as an employee of such employer;

93 Cong. Rec. 4704 (1947). The remainder of subsection (c) listed additional not currently relevant categories of exemptions. In introducing this proposed amendment, Senator Ball, one of its authors, stated that one of Section 302's purposes was to ensure that payments by employers to the unions would not "degenerate into bribes." 93 Cong. Rec. 4805 (1947). Other senators echoed this understanding. *See, e.g., id.* (statement of Senator Byrd); *id.* at 4877 (statement of Senator Taft). *See also Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (marking that "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control" were the congressional concerns that led to the enactment of Section 302) (footnotes omitted).

It is quite clear from the legislative history that Congress understood that even negotiated payments from em-

ployers might "degenerate into bribes." *See* 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 (1948), (discussing welfare funds). *See also United States v. Phillips*, 19 F.3d 1595 (11th Cir. 1994) (upholding criminal convictions of union officials who negotiated unlawful employer payments in the form of retroactive pension credit), *cert. denied*, 115 S. Ct. 1312 (1995); *Caterpillar*, 107 F.3d at 1060 ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management") (dissent).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531, which amended several sections of the LMRA, including Section 302. Congress intended to broaden the categories of persons affiliated with unions to whom the proscriptions of Section 302 would apply, *see* H.R. Rep. No. 741, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2424, 2469, and to make it applicable "to all forms of extortion and bribery in labor-management relations some of which may slip through the present law." S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2329. Indeed, the Conference Report noted that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organization). "The Government which vests in labor unions the power to act as exclusive bargaining representative must make sure that the power is used for the benefit of workers and not for personal profit." *Id.* at 2331.

In sum, there is nothing in the legislative history to suggest that Congress believed that the process of collective bargaining could "save" otherwise potential illegal or unlawful conduct under Section 302. To the contrary, Congress intended to prohibit *any* payment, including payments negotiated by the employees' exclusive bargaining representative, unless it fell within the Section 302(c) exception. The payments that the UAW negotiated in collective bargaining with Caterpillar—payments to full-time union officials who are not working for Caterpillar—violate Section 302(a) and contravene the expressed intent of the legislation's drafters. Caterpillar's payments to full-time union officials would place such persons in a position in which their self-interest may "conflict with complete loyalty to those whom they serve," and cause responsible trade union officials to "have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." Thus, unless section 302(c)(1) applies, the sought-after payments violate Section 302(a).

II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c)(1) EXCEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SECTION 302(a)

The Third Circuit did not find that the payments were exempted under a plain reading of Section 302(c)(1) or its legislative history. Rather, the Third Circuit interpreted the "by reason of" exception in Section 302(c)(1) to apply to the payments solely because they were negotiated in collective bargaining:

We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself.

Caterpillar, 107 F.3d at 1056. By extending the exception to payments made to grievance representatives who take "years, even decades, of paid union leave," and perform *no* work for the employer, simply because those payments are bargained for, the Third Circuit has so far broadened the scope of the exception that it has swallowed the prohibitions in Section 302(a).

None of the other courts of appeals to consider the scope of Section 302(c)(1) has applied the exception to payments not directly connected with the individual's past service for the employer. Neither have they rationalized such payments because the payments were "negotiated" in collective bargaining. *See, e.g., Toth*, 883 F.2d at 1305 ("at some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302(a)—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment, or if the terms vested so much discretion in the employer that the potential for undue influence created a clear section 302(a) violation"); *IBEW Local 2514 v. National Fuel Distribution Corp.*, 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993).

Rather, the "by reason of" exception of Section 302(c)(1) has consistently been interpreted to encompass payments for past service that are not properly classified as "compensation." *Caterpillar*, 107 F.3d at 1058 (Mansmann, J., dissenting) (collecting cases). The federal courts have applied the "by reason of" exception to pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay and pension benefits"), *cert. denied*, 115 S. Ct.

1312 (1995); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits and the like"); see also *Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994 (1989).

Without the "by reason of" exception for past service, these payments would be illegal if paid to any employee or former employee who worked full-time for a union because they could not be considered "compensation" from the employer. This exception in its traditional application serves a salutary purposes. Labor management relations in the workplace would be imperiled if employees who were given time off with pay to process grievances would lose the right to these benefits simply because they worked part-time, or took short periods of leave under the employer's policy to serve as a union official. As the dissent in *Caterpillar* recognized, "[s]ection 302(c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service to the union; the exception allows union representatives to receive payments *in spite of* their current service for the union." *Caterpillar*, 107 F.3d at 1059 (Mansmann, dissenting).

Until the Third Circuit's decision, the linchpin between lawful conduct and employer payments has always been that the employee must receive the compensation or other payments because of his or her service for the employer. *Caterpillar*, 107 F.3d at 1059, citing *Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"), *id.* (under plain meaning of exception, "payment given to *former* employee must be for services

he rendered *while he was an employee*"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work") and at 1050 ("The exception permits only compensation for or by reason of 'service as an employee'; a union official who, though on the employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception"); *Reinforcing Iron Workers Local Union No. 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for the union, not employer, are unlawful).

After the Third Circuit's decision, there is no legal distinction between the arrangement in *Caterpillar* and an arrangement in which an employer agrees to pay the salaries and fringe benefits for full time union officers or agents who have not worked actively for five, ten, or fifteen years. For example, the Third Circuit's interpretation may give unions—on threat of strike or other economic pressure, or as a negotiated trade-off for other terms and conditions in the collective bargaining agreement—the power to demand employer payments to full-time union officials so long as those officials worked for the employer at some point in time. According to the Third Circuit, as long as the payment is "by reason of" the official's past service for the employer and the employees agreed to it in collective bargaining, it is lawful under Section 302(a). That interpretation is not supported by the legislative history, the plain reading of the statute, or any of the cases previously decided in the other circuits. Further, that interpretation invites the abuse of the collective bargaining process which Congress sought to address through Section 302 and which would be inimical to fundamental principles of labor law and policy.

In effect, the Third Circuit's interpretation legitimizes virtually any type of payment from the employer to a union official so long as the payment is negotiated and ratified in a collective bargaining agreement. That interpretation would so eviscerate Section 302 as to render it a nullity, once again leaving the collective bargaining process ripe for abuse.

III. LABOR AND MANAGEMENT REQUIRE UNIFORM FEDERAL GUIDANCE TO INTERPRET SECTION 302(c)(1) IN LIGHT OF THE CHANGED LEGAL LANDSCAPE IN THE WORKPLACE

When Section 302 was first passed in 1947, the employment landscape was vastly different. Aside from jointly-trusted welfare funds established pursuant to Section 302(c)(5), 29 U.S.C. § 186(c)(5), there was no such thing as an ERISA-covered pension plan, employee welfare benefit plan, vacation plan, 401(k) plan, and the like. Health care coverage was not portable. *See* The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, Aug. 21, 1996, 110 Stat. 1936. There was no Family Medical Leave Act that required employers to grant unpaid leave without any disruption to the employee's entitlement to benefits. *See* 29 U.S.C. § 2601-54. These workplace benefits now exist. If employees who temporarily leave the employer's workplace for reasons other than union business do not lose their right to accrue credit towards these various benefits, employees who take leaves of similar duration to serve as union officials should not lose their benefits either.

However, once the union "negotiates" for exceptions that apply *only* to union officials—expanding a leave of absence policy only for union officials, or procuring retroactive pension credit solely for union officials—the union engages in the types of conduct prohibited by Section 302(a). The "potential" for conflicts of interest arises, and the officials' duty of loyalty is compromised. If the

Third Circuit's "full-time union office" exception is accepted, it would provide fertile ground for corruption by permitting union officials who perform no work for the employer to negotiate special wages and benefits applicable to themselves alone on the basis that they once worked for the employer. Whether the bargaining unit employees "ratify" the illegal payment that their negotiators have procured is irrelevant under the plain language of the statute, its legislative history, and the judicial precedent of other circuits. To compensate such individuals who perform no current work for their employer is clearly not what Congress intended to privilege when it enacted the Section 302(c)(1) exception.

The Third Circuit's decision is fundamentally inconsistent with every other court of appeals which has considered the Section 302(c)(1) exception. To provide uniformity and prevent abuse of the collective bargaining process, and for the reason that the Act's criminal proscriptions attach to employers as well as unions, COLLE urges the Court to consider this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CATERPILLAR INC.,
v. *Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	2
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	4
REASONS FOR GRANTING THE WRIT	5
BECAUSE OF THE SUBSTANTIAL LIABILITY FOR VIOLATIONS OF THE STANDARDS SET FORTH IN SECTION 302, AND BECAUSE THE LOWER COURTS HAVE FAILED TO ARTICULATE A CONSISTENT AND RELIABLE POSITION AS TO WHAT THOSE STANDARDS ARE, THIS COURT SHOULD PROVIDE MEANINGFUL GUIDANCE ON THE SCOPE OF THE SECTION 302(C) (1) EXCEPTION	5
A. Section 302 Provides Substantial Criminal Penalties for Non-Compliance With Its Provision.....	5
B. The Courts of Appeals Have Failed to Articulate a Consistent Standard With Respect to Section 302(c) (1)	8
C. This Court Should Provide Meaningful Guidance Regarding the Scope of Section 320 (c) (1)	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
<i>Auer v. Robbins</i> , 117 S. Ct. 905 (1997)	3
<i>BASF Wyandotte Corp. v. Local 227, ICWU</i> , 791 F.2d 1046 (2d Cir. 1986)	9, 11, 12
<i>Caterpillar v. International Union, UAW</i> , 107 F.3d 1052 (3d Cir. 1997)	9, 11
<i>Communications Workers v. Bell Atlantic Network Services</i> , 670 F. Supp. 416 (D.D.C. 1987)	12
<i>Electromation v. NLRB</i> , 35 F.3d 1148 (7th Cir. 1994)	3
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	15
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) ..	12, 13
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	9, 11, 12, 15
<i>NLRB v. Town & Country Electric</i> , 116 S. Ct. 450 (1995)	3
<i>Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.</i> , 634 F.2d 258 (6th Cir. 1981)	9
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), <i>cert. denied</i> , 493 U.S. 994 (1989)	9, 10, 11
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council</i> , 785 F.2d 101 (3d Cir.), <i>cert. denied</i> , 479 U.S. 932 (1986)	11
<i>United States v. Bloch</i> , 696 F.2d 1213 (9th Cir. 1982)	7, 8
<i>United States v. Boffa</i> , 688 F.2d 919 (3d Cir. 1982), <i>cert. denied</i> , 460 U.S. 1022 (1983)	8
<i>United States v. Carter</i> , 311 F.2d 934 (6th Cir.), <i>cert. denied</i> , 373 U.S. 915 (1963)	7, 8
<i>United States v. Cervone</i> , 907 F.2d 332 (2d Cir. 1990)	7
<i>United States v. Clemente</i> , 106 L.R.R.M. (BNA) 2673 (2d Cir. 1981)	8
<i>United States v. Cody</i> , 722 F.2d 1052 (2d Cir.), <i>cert. denied</i> , 467 U.S. 1226 (1983)	7
<i>United States v. Daly</i> , 842 F.2d 1380 (2d Cir. 1982)	8
<i>United States v. Gruttadauro</i> , 818 F.2d 1323 (7th Cir. 1987)	7

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Kaye</i> , 556 F.2d 855 (7th Cir.), <i>cert. denied</i> , 434 U.S. 921 (1977)	8, 9
<i>United States v. Leroy</i> , 111 L.R.R.M. (BNA) 2238 (2d Cir. 1982)	8
<i>United States v. Molina</i> , 95 L.R.R.M. (BNA) 2613 (9th Cir. 1977)	8
<i>United States v. Papia</i> , 910 F.2d 1357 (7th Cir. 1990)	7
<i>United States v. Pecora</i> , 484 F.2d 1289 (3d Cir. 1973)	7, 8
<i>United States v. Persico</i> , 621 F. Supp. 842 (C.D. N.Y. 1985)	8
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir. 1994), <i>cert. denied</i> , 115 S. Ct. 1312 (1995)	7, 10, 11
<i>United States v. Silva</i> , 517 F. Supp. 727 (D.R.I. 1980), <i>aff'd</i> , 644 F.2d 68 (1st Cir. 1981)	7, 8
DOCKETED CASES	
<i>Allentown Mack Sales and Service, Inc. v. NLRB</i> , No. 96-795 (U.S.)	3
<i>Novotel New York Hotel v. NLRB</i> , No. 96-1488 (D.C. Cir.)	3
STATUTES	
Act of Oct. 12, 1984, Pub. L. No. 98-473, § 801, 98 Stat. 2131 (1984)	7
Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186	2, 4
29 U.S.C. § 186(a)	6
29 U.S.C. § 186(b)	6
29 U.S.C. § 186(c) (1)	8, 13, 14
29 U.S.C. § 186(d) (2)	5, 6
MISCELLANEOUS	
Collective Bargaining, Negotiations and Contracts 51:201 (BNA)	15
<i>Use of the Trust Funds for Union Activities: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means</i> , 105 Cong., 2d Sess. (1996) (statement of Dr. Shirley Chater, Commissioner of Social Security)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1925

CATERPILLAR INC.,
v. *Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF *AMICUS CURIAE* OF THE
LABOR POLICY ASSOCIATION
IN SUPPORT OF PETITIONER**

The Labor Policy Association respectfully submits this brief as *amicus curiae*.^{*} The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for writ of certiorari.

^{*} Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* Labor Policy Association certifies that counsel for *amicus curiae* Labor Policy Association authored this brief in whole.

INTEREST OF THE AMICUS CURIAE

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to Section 302 of the Labor Management Relations Act (LMRA or the Act), 29 U.S.C. § 186. Moreover, many LPA members are likely to be parties to collective bargaining agreements like the one at issue here, wherein they have agreed to pay the wages of full-time union officials who are former employees, but who no longer perform any work for the company.

As a result, LPA is deeply concerned about the present status of the law in this area. The LMRA imposes on employers and their representatives substantial criminal liability for noncompliance with the standards of Section 302. The Courts of Appeals, however, have been unable to articulate a consistent position as to what those standards are. Thus, as an organization representing senior human resource officers—the individuals most exposed to potential sanctions under this law—LPA has a strong interest in this case.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* in numerous cases before this Court, *see e.g.*

Allentown Mack Sales and Service, Inc. v. NLRB, No. 96-795 (decision pending); *Auer v. Robbins*, 117 S. Ct. 905 (1997); *NLRB v. Town & Country Elec.*, 116 S. Ct. 450 (1995), as well as the United States Courts of Appeals. *E.g. Novotel New York Hotel v. NLRB*, No. 96-1488 (D.C. Cir.) (decision pending); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

Thus, LPA has an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in Petitioner's brief. A summary of the facts relevant to this brief is set out below.

Petitioner Caterpillar Inc. (Caterpillar) and the United Auto Workers Local 786 (UAW) have been parties to collective bargaining agreements (CBA) since 1954. (Pet. App. at 4a.) These agreements consistently contained a "no-docking" provision which allowed union stewards and committeemen to devote part of their work week to union business without losing pay and benefits. (*Id.*) In 1973, Caterpillar and UAW revised their CBA to include payment of wages and benefits, by Caterpillar, to union committeemen working full-time for the union. (*Id.*) These full-time union committeemen (Committeemen) performed no duties for Caterpillar, conducted all business from the union hall, and were not under the control of Caterpillar except with regard to time reporting. (*Id.*)

In 1991, after their existing CBA expired, a nationwide labor dispute between Caterpillar and UAW erupted. (*Id.*) Soon thereafter, Caterpillar ceased paying the Committeemen, concluding that the payments violated Section 302 of the LMRA. (*Id.*) As a result, UAW filed an unfair labor practice charge against Caterpillar with the National Labor Relations Board (NLRB), alleging that the company refused to bargain in good faith regarding the payments. (*Id.*) A month later, Caterpillar filed this action seeking a declaratory judgment that the payments violate Section 302. (*Id.*)

The district court stayed the proceedings pending resolution of UAW's unfair labor practice charge. (*Id.*) After the NLRB Administrative Law Judge (ALJ) recommended dismissal of the unfair labor practice charge,¹ the district court ruled that the payments in question violated Section 302 of the LMRA. (*Id.*) UAW appealed the ruling to the Third Circuit, which overruled its own precedent and reversed the lower court ruling. (*Id.* at 3a.)

SUMMARY OF REASONS FOR GRANTING THE WRIT

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (Section 302), places stringent restrictions on financial transactions between an employer, or an employer's agent, and union officials who represent the employer's workers. 29 U.S.C. § 186. To enforce this prohibition, Section 302 provides substantial criminal liability for those individuals who violate its provisions, including a fine of up

¹ The ALJ found that the payments violated Section 8 of the National Labor Relations Act (NLRA). Although questioning the validity of the payments under Section 302, the ALJ did not decide that issue.

to \$15,000, imprisonment for up to five years, or both. 29 U.S.C. § 186(d)(2).

Despite these potentially severe sanctions, however, the lower courts have been unable to articulate a consistent standard regarding the substance of the prohibitions found in Section 302 in relation to the exception found in Section 302(c)(1).

The resulting uncertainty has placed employers in the unenviable—if not intolerable—position of being exposed to criminal liability for conduct that has not been reliably or consistently defined. Moreover, the uncertainty regarding the status of the law in this area has introduced additional, and wholly unnecessary, tensions in labor-management relations—relations which, by their very nature, are often strained to begin with.

As a result, although LPA does not urge upon the Court any particular resolution of this issue, we nonetheless respectfully request that the Court grant certiorari in this case, and provide meaningful guidance to employers on the scope of Section 302(c)(1).

REASONS FOR GRANTING THE WRIT

BECAUSE OF THE SUBSTANTIAL LIABILITY FOR VIOLATIONS OF THE STANDARDS SET FORTH IN SECTION 302, AND BECAUSE THE LOWER COURTS HAVE FAILED TO ARTICULATE A CONSISTENT AND RELIABLE POSITION AS TO WHAT THOSE STANDARDS ARE, THIS COURT SHOULD PROVIDE MEANINGFUL GUIDANCE ON THE SCOPE OF THE SECTION 302(C)(1) EXCEPTION

A. Section 302 Provides Substantial Criminal Penalties for Non-Compliance With Its Provision

Section 302 of the LMRA (Section 302) places strict limitations on payments between an employer,

or the employer's representatives, and individuals who represent the employer's workers. Section 302(a) states in pertinent part:

It shall be unlawful for an employer . . . or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce

29 U.S.C. § 186(a).²

To enforce this prohibition, Section 302 provides harsh criminal sanctions on employers and their representatives:

. . . any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisonment for not more than five years, or both . . .

29 U.S.C. § 186(d)(2).³

² Section 302(b) also makes it unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited in Section 302(a). 29 U.S.C. § 186(b).

³ The penalties under Section 302 are limited to a misdemeanor conviction, a fine of not more than \$10,000, or im-

Moreover, willfulness, as used in this section, refers only to a willfulness to commit the underlying act. General intent to commit the prohibited act is sufficient for conviction, and no underlying evil intentions need be proven. *See e.g. United States v. Phillips*, 19 F.3d 1565, 1579 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987); *United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir.), *cert. denied*, 467 U.S. 1226 (1983); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963). *See also United States v. Silva*, 517 F. Supp. 727, 735 (D.R.I. 1980), *aff'd*, 644 F.2d 68 (1st Cir. 1981).

The prohibitions found in Section 302 are not intended to be innocuous, rarely-enforced provisions of law. Indeed, in 1984, Congress recognized this when it amended the Act to make violations of Section 302 felonies, as opposed to misdemeanors, and to increase the maximum term of imprisonment from one to five years. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 801, 98 Stat. 2131 (1984). Likewise, the reporters are full of examples of the concrete application of this law. *See e.g. United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *United States v. Papia*, 910 F.2d 1357 (7th Cir. 1990); *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990); *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987); *United States v. Cody*, 722

prisonment for not more than a year when the thing of value involved does not exceed \$1000. This limitation, however, will rarely apply to situations like the instant case, where the thing of value is a full time salary.

F.2d 1052 (2d Cir.), *cert. denied*, 467 U.S. 1226 (1983); *United States v. Daly*, 842 F.2d 1380 (2d Cir. 1982); *United States v. Bloch*, 696 F.2d 1213 (9th Cir. 1982); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Leroy*, 111 L.R.R.M. (BNA) 2238 (2d Cir. 1982); *United States v. Clemente*, 106 L.R.R.M. (BNA) 2673 (2d Cir. 1981); *United States v. Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Molina*, 95 L.R.R.M. (BNA) 2613 (9th Cir. 1977); *United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973); *United States v. Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *United States v. Persico*, 621 F. Supp. 842 (C.D.N.Y. 1985); *United States v. Silva*, 517 F. Supp. 727 (D.R.I. 1980), *aff'd*, 644 F.2d 68 (1st Cir. 1981).

B. The Courts of Appeals Have Failed to Articulate a Consistent Standard With Respect to Section 302(c)(1)

There are statutory exceptions to the prohibitions found in Sections 302(a) and (b). Relevant to this case is the exception found at 302(c)(1) which states:

[t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer . . . to any representative of his employees . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . .

29 U.S.C. § 186(c)(1).

Designed as a safe harbor for legitimate payments between an employer and its employees or former employees, Section 302(c)(1) sets forth the criteria for permissible payments. An employer's payment to

a union representative is lawful if it is given "as compensation for, or by reason of," the representative's "service as an employee of such employer." 29 U.S.C. § 186(c)(1).

Notwithstanding the substantial criminal sanctions that attach to violations of Section 302, the Courts of Appeals have been wholly unable to articulate a consistent or reliable position regarding the scope of this exception, especially with respect to the practice at issue here—the payment of wages to full-time union officials who have previously worked for the employer.

Several circuits have held that such individuals are not employees, and therefore cannot be compensated as contemplated in the statutory exception. *See e.g. Caterpillar v. International Union, UAW*, 107 F.3d 1052 (3d Cir. 1997); *Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 864-65 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

Several other circuits, however, have concluded that some limited forms of compensation may be paid to union officials—provided that those officials perform actual work for the company. *See e.g. BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046, 1049 (2d Cir. 1986); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986). Both of these courts, however, indicated in dicta that payment of wages to full-time union officials, as is the case here, would violate Section 302. 791 F.2d at 1050; 798 F.2d 856 n.4.

The Seventh Circuit, on the other hand, has held that certain benefit payments made to union officials who do not perform any work for the company are permissible under Section 302. *Toth v. USX Corp.*,

883 F.2d 1297, 1304 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989). The Seventh Circuit concluded that some benefit payments may be permitted under the "by reason of" language of the Act. *Id.* Notably, however, the court did not hold that all benefits were permitted. On the contrary, the Seventh Circuit concluded that only those benefits that meet the court's prescribed test are lawful.⁴ The Seventh Circuit did join with the Second and Fifth Circuits in concluding that wage payments to full-time union official were prohibited by Section 302. *Id.*

The Eleventh Circuit, on the other hand, declined to adopt the Seventh Circuit approach, even though it was reviewing the exact same benefit policy that was at issue in *Toth*. In *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), the Eleventh Circuit held that "all payments given by an employer to a former employee must be for past services rendered by the former employee while employed by the employer to qualify for an exception under 186(c)(1)." *Id.* Thus, the court concluded that the "by reason of" language of the Act extends to only those benefits which have vested before the employee begins a leave of absence. *Id.*

Finally, the Third Circuit's decision in the instant case departs from all of the other circuits. Here, the court below concluded that all payments—wages and benefits—may be permitted by the "by reason of" language, provided that a collective bargaining agree-

⁴ Factors considered in the Seventh Circuit test include whether the benefits were "openly collectively bargained," "generally disseminated," "uniformly applicable," not "incommensurate" with past employment, and largely nondiscretionary. *Id.* at 1304-05. Applying this test to the *Toth* case, the court found the benefits unlawful because they were unilaterally implemented by the employer. *Id.* at 1305.

ment provides for such payments. *Caterpillar*, 107 F.3d at 1056. Thus, the court below concluded that the employer and a union can agree upon what the statutory term "by reason of" means.

Thus, it is clear that the Courts of Appeals have been unable to articulate a consistent interpretation of the scope of Section 302 of the LMRA.

In addition to the inconsistency between circuits—or perhaps because of it—the lower courts also have been unable to provide a reliable interpretation of the law within a particular circuit.

The present case is an example of this unreliability. Here, the Third Circuit has overruled its own precedent, which otherwise would have provided a contrary result. See *Caterpillar*, 107 F.3d at 1053 (overruling *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986)). Significantly, the *Trailways* decision was not some outdated, oft-criticized holding. Indeed, the most recent circuit court opinion, *Phillips*, was in accord. Compare *Phillips*, 19 F.3d at 1575 ("Whether 'as compensation for' or 'by reason of' service to an employer, all payments from an employer to a union official must relate to services actually rendered by the employee for section 186(c)(1) to apply.") with *Trailways*, 785 F.2d at 106 (Section 302(c)(1) allows payments to former employees only for "past services actually rendered by those former employees while they were employees of the company."). Moreover, dicta from other circuits that have addressed the issue indicates that, under the circumstances of this case, they would opt for the *Trailways* approach. See e.g. *Toth v. USv Corp.*, 883 F.2d at 1304; *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1050; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at

856 n.4. Thus, the Third Circuit's reversal cannot, by any means, be considered foreshadowed.

The unreliability of present law with respect to Section 302 also is evident from *Communications Workers v. Bell Atlantic Network Services*, 670 F. Supp. 416, 422-23 (D.D.C. 1987), where the district court relied on *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1049, and *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at 856, to permit employer benefit payments to full-time union officials. Both of those cases, however, cautioned against precisely that kind of activity. *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1050; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at 856 n.4.

The above cases illustrate that, notwithstanding the potentially substantial criminal liability that can attach under Section 302, the lower courts have failed to articulate a consistent and reliable position with respect to the scope of that section.

C. This Court Should Provide Meaningful Guidance Regarding the Scope of Section 320(c)(1)

The uncertainty and confusion that has resulted from the above cited cases has placed employers in the unenviable—if not intolerable—position of being exposed to criminal liability for conduct that has not been consistently or reliably defined.

Although strictly speaking, the doctrine of vagueness is not relevant to this case,⁵ this Court's reasoning on the principle is illustrative of the difficulty that has arisen here.

⁵ The doctrine of vagueness will invalidate statutory provisions on constitutional grounds, if those provisions do not sufficiently define the proscribed conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Although the language of Section 302(c)(1) appears straightforward enough, the patchwork of inconsistent, contradictory and unreliable lower court rulings in this area have denied "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

For this reason alone, this Court should address the issue.

It might be argued that, because Section 302(c)(1) is an exception to a general prohibition found in the Act, employers can avoid liability by not making any payments to union representatives at all. Perhaps this is true.⁶ Nonetheless, such a contention greatly oversimplifies the problem at hand, and does not

⁶ LPA is not sure that, as a practical matter, this proposition is true. The Third Circuit's decision below constitutes an affirmative and authoritative statement that payment of wages to full-time union officials is legal. Thus, employers without sufficient means to obtain thorough legal counsel on this complex issue will not be put on notice of the potential hazards. The decision below, combined with the uncertain state of the law in other circuits, may indeed work to "trap the innocent." *Grayned*, 408 U.S. at 108.

justify the proposition that this Court should decline to review the issue.

First, such a view defeats the very purpose of Section 302(c)(1). Congress clearly envisioned a need to allow some types of payments between employers and union representatives. Thus, forcing employers—for caution's sake—to abandon all types of payments to union officials is clearly not the answer envisioned by Congress.

Furthermore, the cacophony of lower court decisions on this matter has introduced an unnecessary, but substantial, tension in labor-management relations—relations which, even without this problem, are frequently volatile.

As a result of the decision below, unions undoubtedly will be encouraged to pursue—perhaps legally⁷—these types of payments nationwide. *Notwithstanding the decision below*, many employers will continue to resist even discussing—perhaps legally⁸—these types of payments because of the contradictory conclusions of other circuits.

The potential industrial unrest that may arise from the uncertainty of the law in this area should not be underestimated. It is common practice for

⁷ Until this Court addresses the issue, no one can say with certainty whether such unions would be zealously pursuing the rights of their members, or, acting unlawfully under Section 302(b).

⁸ Again, until this Court addresses the issue—and until the NLRB addresses a related case discussed below—no one can say with certainty whether employers who refuse to discuss such payments are properly attempting to avoid liability under Section 302, or, unlawfully refusing to bargain under Section 8(a)(5) of the NLRA.

unions to seek, and employers to grant, “no-docking” provisions in CBAs. See (Amended Br. for the United States as *Amicus Curiae* before the Court of Appeals for the Third Circuit at 10); *Use of the Trust Funds for Union Activities: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105 Cong., 2d Sess. (1996) (statement of Dr. Shirley Chater, Commissioner of Social Security); *Collective Bargaining, Negotiations and Contracts* 51:201 (BNA). As a result of the decision below, it is not a large leap to say that unions now will press for the full-time payments at issue here.

Even more significantly, a related case, *Caterpillar Inc.*, 33-CA-9990, 33-CA-10033, now pending before the NLRB, will decide whether these full-time payments are mandatory subjects of bargaining under the NLRB. Should the Board follow the Third Circuit approach, an employer's refusal to bargain over such payments may be a violation of Section 8(a)(5) of the NLRB. The NLRB already has decided that the payment of wages to employees who work part-time for the union is a mandatory subject of bargaining. See *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986). Thus employers, especially those in circuits that have not addressed this issue, will effectively have to gamble between an 8(a)(5) violation—and potential strikes and large backpay awards—or potential criminal liability under Section 302.

This type of industrial strife, which is the likely, if not inevitable, result of the confused state of the law with regard to Section 302, is clearly inconsistent with one of the important purposes of federal labor policy—“industrial peace.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 (1987).

It can be avoided through guidance from this Court in this case.

CONCLUSION

For the foregoing reasons, LPA respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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August 6, 1997

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No. 96-1740 1925

Supreme Court, U.S.

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FOR THE THIRD CIRCUIT

BRIEF OF THE CENTER ON NATIONAL LABOR
POLICY, INC. AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER CATERPILLAR INC.

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24 140

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE ANTI-BRIBERY AND FEATHERBEDDING PROVISIONS OF THE LABOR ACT DO NOT SHIELD UNLAWFUL TRANSACTIONS SIMPLY BY SETTING THEM FORTH IN A COLLECTIVE BARGAINING AGREEMENT	7
II. THE CONCEPT THAT ALL BARGAINING UNIT EMPLOYEES TRADED PAST ECONOMIC BENEFITS FOR POSSIBLE FUTURE WAGE PAYMENTS AS A UNION OFFICIAL IS A LEGAL FICTION THAT MUST BE DISAVOWED BY THE COURT TO VINDICATE THE PURPOSE OF SECTION 302(c)(1)	14
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

Page

<i>American Newspaper Publishers Assn. v. NLRB</i> , 345 U.S. 100 (1953)	13
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959)	7
<i>Caterpillar Inc. v. International Union, United Automobile Workers, et al.</i> , 107 F.3d 1052 (3d Cir. 1997)	8
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988)	17-19
<i>Int'l Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961)	19
<i>Lykins v. Aluminum Workers International Union</i> , 510 F. Supp. 21 (E.D.Pa. 1980)	19
<i>North Bay Development Disabilities Services, Inc. v. NLRB</i> , 905 F.2d 476 (D.C. Cir. 1990)	3
<i>Retail Clerks v. Schermerhorn</i> , 373 U.S. 746 (1963)	6, 19
<i>Steele v. Louisville & Nashville Railroad Co.</i> , 323 U.S. 192 (1944)	19
<i>Trailways Lines, Inc. v. Trailways Inc. Joint Council</i> , 785 F.2d 101 (3d Cir.)	5
<i>United States v. Gruttadauro</i> , 818 F.2d 1323 (7th Cir. 1987)	15

<i>United States v. Petrillo</i> , 332 U.S. 1 (June 23, 1947)	12
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967)	19

LEGISLATIVE HISTORY

93 Cong. Rec. 6601 (June 5, 1947)	11
93 Cong. Rec. 6603 (June 5, 1947)	10
93 Cong. Rec. 6693 (June 6, 1947)	11
93 Cong. Rec. 7001 (June 12, 1947)	11
93 Cong. Rec. 7500 (June 20, 1947)	12
93 Cong. Rec. 7683 (June 23, 1947)	12
93 Cong. Rec. A1295 (Mar 24, 1947)	10
93 Cong. Rec. A2824 (June 20, 1947)	10
H.R. No. 245, 80th Cong. 1st Sess.	9
Analysis of the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare (Sept. 10, 1959), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE OF 1959	14

STATUTES

29 U.S.C. § 158(b)(6)	<i>in passim</i>
29 U.S.C. § 186(c)(1)	<i>in passim</i>

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INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Center on National Labor Policy, Inc. ("Center") submits this brief *amicus curiae* in support of the Petitioner. All parties have given written consent to the filing of this Brief.¹

INTEREST OF THE *AMICUS CURIAE*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitu-

¹Letters of consent have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

tional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before the Court, including, *International Union, United Mine Workers v. Bagwell*, No. 92-1625; *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, No. 91-15; *Lehnert v. Ferris Faculty Assn.*, No. 89-1217; *Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council*, No. 80-1257; and *New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

The parties to the instant case will primarily focus on important structural aspects of the Section 302(c)(1) restriction on the transfer of anything of financial value from an employer to a labor union official. Equally important, however, is the underlying conceptual question that the payment of "wages" to a former employee who performs no contemporaneous work for the employer can be a properly bargained-for transfer of employee resources approved by all employees in the bargaining unit.

The Center's primary interest in presenting the public interest where pressure groups attempt to affect the nation's welfare through illegal action is at stake here. However, beyond the narrow issues appearing in the Center's mandate, the Center has an interest in the integrity of the courts and in both lawful and peaceful societal behavior that protects the guaranteed option of employees and employers not to associate or be taxed for paying wages for the profit of union officials. This interest is directly challenged by the Respondents' efforts to procure payments to subsidize their parochial activities at the expense of securing better wages and benefits for all working employees in the bargaining unit, union and non-union alike.

The Center does not doubt that Petitioner will fully argue its interests here. However, because the interest of Caterpillar Inc. ("Caterpillar" or "Petitioner") in avoiding contractual liability on the basis of the Labor Act or upon yet to be agreed to terms of any settlement agreement between it and the International Union, United Automobile Workers ("Union" or "UAW"), does not in itself include the interests of the employees, that interest is at risk.²

Likewise, the Center does not doubt that Respondent Unions will fully argue their interests -- e.g., to continue to receive employer wage payments as union officials -- in this case. However, because the interest in collecting these payments naturally focuses upon the act of bargaining and the union's self-interest in its internal affairs, the broader public interest in ensuring independent unions and the prevention of collusion and corruption is potentially compromised.

The Center respectfully submits that it is in a unique position to fully advocate the rights of the public and those individuals who have suffered from the actions of Respondents in the past and those whose earned wages were affected because of the decisionmaking of private parties in which they could not participate. See *Price v. UAW*, 621 F. Supp. 1243 (D. Conn. 1985), *aff'd*, 795 F.2d 1128 (2d Cir. 1986), *vacated*, 487 U.S. 1229 (1988); *on remand*, 722 F. Supp. 933 (D. Conn. 1989), *aff'd*, 927 F.2d 88 (2d Cir. 1991), *cert. denied*, 502 U.S. 905 (1991).

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

²See *North Bay Development Disabilities Services, Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *enfg.*, 287 N.L.R.B. 1223 (1988), *cert. denied*, 498 U.S. 1082 (1991) (employer cannot articulate non-union employee interests in ascertaining germane collective bargaining expenses during collective bargaining over an agency shop provision).

QUESTION PRESENTED

Whether the anti-corruption provision of Section 302(c)(1) of the National Labor Relations Act, 29 U.S.C. § 186(c)(1), forbids an employer from agreeing to make payments to former employees on leave as union officials because this is a form of "featherbedding" prohibited by § 8(b)(6) of the Act and because there can be no legal fiction that objecting non-union employees of the employer agreed to exchange a portion of their wages and benefits to these union officials in past collective bargaining agreements to which they had no vote.

STATEMENT OF THE CASE

This case arises on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. *Caterpillar Inc. v. International Union, United Automobile Workers, et al.*, 107 F.3d 1052 (3d Cir. 1997), *rev'g*, 909 F. Supp. 254 (M.D. Pa. 1995).

STATEMENT OF FACTS

Caterpillar and the Union had been parties to a series of collective bargaining agreements. For several terms, Caterpillar agreed to pay the wages of two groups of "employees" who became elected officials of the Union. One group continued to perform work in its plants as grievencemen and stewards and the second group became full-time union officers and no longer performed any services for Caterpillar.

In 1992, Caterpillar informed the UAW that it would not agree to pay the wages and benefits of union officials not performing any employer work. After a union strike that began in April 1992, in which the UAW had rejected the employer's contract demands, the union employees agreed to return to work. The union then demanded reinstitution of full-time union officer wages from Caterpillar and an increase thereto. To date, Caterpillar and the UAW have yet to reach an agreement.

Caterpillar filed a suit for declaratory judgment in the United States District Court for the Middle District of Pennsylvania to declare the payment of money to full-time union officials under these circumstances violated the Act. The case was initially stayed to permit the National Labor Relations Board to consider the question. An administrative law judge found the payments "raise a serious issue under Section 302" and were "facially violative of Sections 8(a)(3) and 8(b)(2)." App. at 81a-82a.³

The District Court lifted the stay and agreed that the payment of wages and benefits was not exempted by the restrictions placed on Section 302(c)(1) and granted Caterpillar's request for declaratory relief. The Third Circuit, sitting *en banc*, reversed in a 9-3 opinion. The majority of the Court disagreed with the district court and overturned long-standing law in the circuit to do so: *Trailways Lines, Inc. v. Trailways Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986).

The remaining facts of this case are set out by Petitioner Caterpillar Inc. in its brief and are adopted here.

SUMMARY OF ARGUMENT

Until the decision in this case, the Circuit Courts have been in general agreement that Congress had intended for employer money be kept completely out of the pockets of labor organizations and labor union officials. The amendments to the Labor Act in 1947 were specifically introduced to prohibit featherbedding, extortion, payoffs, and subterfuge that distracts union officials from representing workers fairly.

The decision of the Third Circuit conflicts with the statutory purpose of Sections 302(c)(1) and 8(b)(6) of the Labor Act. The Third Circuit's explanation that payments to full-time union officials are permitted "by reason of" their former service to the employer is an anomalous concept. Those former employees were already

³"App." references are to the Appendix to the Petition for Writ of Certiorari.

paid once for their work. To suggest that a demand for an additional \$50,000.00 per year per official, 79a, is simply a mere portion of the pooled value of compensation they might have shared with other workers as a working employee of Caterpillar in some past period, is ludicrous.

The Third Circuit's construct that all workers agreed in past negotiations for the opportunity/possibility to receive this benefit as a union official in the future, is not supported. Simply put, the Union is but a majority representative. Not all of Caterpillar's workers had an opportunity to vote on the contracts to give the union officials the wages and benefits they now seek to secure from the federal courts. The Third Circuit's reasoning is faulty.

Non-member employee agency fee payers under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), have no right to vote on union contracts or become union officers. Therefore to ever share in the gratuity the Third Circuit states was given to full-time union officials with all-employee consent is a legal fiction with no support in the caselaw or the record. The decision portends an evasion of union responsibility to provide agency fee payers with proper evidence of union expenses germane to collective bargaining and not force them to share a greater institutional supporting role for the union organization then voluntary members would otherwise have to assume. See *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

These payments to full-time union officials are simply a method of "featherbedding" prohibited by Section 8(b)(6) of the Act. The payments are not made for any contemporaneous services or work performed for the benefit of the employer. It is admitted that the union officials receiving these payments perform no services or work for the employer's benefit and on this record are considered employees of the Union, not of Caterpillar. App. 7a.

Under these circumstances, the Third Circuit's reliance upon the "by reason of" language in Section 302(b) is to no avail. That language was used by Congress to permit certain employer payments for work-related activities such as rest periods and safety

patrols. Although not directly enhancing an employer product, these activities relate to work that actually was performed by workers while under the employer's supervision. This Court has interpreted Section 8(b)(6) as requiring that compensation may be given only for work actually performed by the worker. *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953).

Here, the Third Circuit does not relate its authorization to any services the full-time union official would render to Caterpillar. On that account, it would be an illegal payment under Section 302(a) and the receipt would be illegal under Section 302(b). Moreover, for the union to articulate a desire to force the employer to consider making payments to the Union's own employees, during bargaining is "garden variety" featherbedding prohibited by Section 8(b)(6).

For these reasons, this Court must find that the Third Circuit failed to properly exercise lawful and appropriate supervision of union activities under the Labor Act. If permitted to stand, the case will be a model for stripping the heart out of the legislative purpose to maintain union independence by keeping union hands out of employer pockets.

REASONS FOR GRANTING THE PETITION

I. THE ANTI-BRIBERY AND FEATHERBEDDING PROVISIONS OF THE LABOR ACT DO NOT SHIELD UNLAWFUL TRANSACTIONS SIMPLY BY SETTING THEM FORTH IN A BARGAINING AGREEMENT.

This Court's Labor jurisprudence has long recognized the existence of an inimical conflict to free and open collective bargaining by the opportunity for corruption where an employer is permitted to pay to a union or union officials money to promote or underwrite union activity. *Arroyo v. United States*, 359 U.S. 419, 425 (1959). The Court considered the legislative history of Section 302 of the Labor Act in that case, and observed Senator Taft's statement on the Senate floor that the statute "was intended to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Id.* at 426 n.8.

In this light, the statutory prohibition against payment of any direct or indirect "wages" and benefits to labor union officials becomes clear. 29 U.S.C. § 186(a)(1) makes it illegal for an employer "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—(1) to any representative or any of his employees," except when made to an "officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer...." 29 U.S.C. § 186(c)(1).

Since the intent of the Congress was to prevent the "shake-down" of employers by labor organizations, the legislative intent extended to all forms of "shake-downs," extortion or blackmail. The short version of the Third Circuit's elucidation of the law is that these very same actions may be accomplished as long as the union puts the deed in writing.

But nowhere in the Third Circuit opinion is there any accommodation for the Labor Act's prohibition on featherbedding contained in Section 8(b)(6) of the Act, 29 U.S.C. § 158(b)(6). This section of the Labor Act makes it unlawful for a union:

to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

With this section of the statute in mind, the exception in section 302(c)(1) that would draw the line against payments to former employees who are union officials becomes clearer. The Court below endeavored to rest its approval of compulsory bargaining on this union plan to receive "wages" based on the "by reason of, his service as an employee of such employer" language of the statute, 107 F.3d 1056, because,

We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the

payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself. Caterpillar was willing to put that costly benefit on the table, which strongly implies that the employees had to give up something in the bargaining process that they otherwise could have received. Thus, every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

The premise of the court's conclusion that the "shake-down" or "back-door deal" can't happen when put in a written agreement fails to account for the Section 8(b)(6) restriction that wage payments are only allowed to employees for services that are "performed" for the employer. Non-wage payments to third persons might be for consulting or other business purposes related to the employer's charter, but here the payments are not for any services rendered for the employer.

As hard as the Third Circuit tries to validate the parties former scheme of paying "wages" to union officials "by reason of" former work where payment was in fact tendered, the Congress has already stated that this type of featherbedding, by contract rather than subterfuge, remains unlawful. The decision below poses a direct threat to the very collusion and corruption that labor organizations have heretofore been prevented from seeking outright. There is no room in the interpretation of the Labor Act that would permit the emasculation of the legislature's intent in this manner.

As the House Report on Section 8(a)(6) reflects, the purpose of the Act was to prevent practices that "requires employers to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have work for." H.R. No. 245, 80th Cong. 1st Sess., at 25, *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 316 (1948).

A major portion of the legislative history underscores the legislative objection to activities of J. Caesar Petrillo, who as President of the American Federation of Musicians, forced employers to hire union personnel and pay them while performing no services for the employer. *Id.* The debates reflect as well, the problem that is in issue at bar. For instance, Rep. Land, one of three managers on the part of the House in the Conference Committee, stated:

No employer should be required to hire more help than necessary. Caesar Petrillo, the czar of the musicians' union decided that our American children must not participate in a musical program over the radio network of this Nation unless the station or sponsor was willing to pay union musicians to do nothing else but stand by in the studio during the children's program. Thus, the children in 200,000 rural schools in the United States are denied the opportunity to learn to play musical instruments by the dictates of one man—Petrillo.

93 Cong. Rec. A1295 (Mar 24, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 584 (1948).

Mr. Landis further explained three months later that the provision was to "make it a violation of the law for a union to try to compel an employer to pay its members for services not performed." 93 Cong. Rec. A2824 (June 20, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 917 (1948).

Senator Taft discussed the intent of the conference committee report and the differences with the House version of the bill on June 5, 1947. In one exchange with Senator Pepper, Senator Taft explained that the Section 8(b)(6) language was to establish a prohibition "in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept." 93 Cong. Rec. 6603 (June 5, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1545 (1948).

In a Senate analysis submitted into the Senate record by Mr. Taft, the Senate conferees showed that the House had defined featherbedding practices to include: "(a) Agreeing to employ persons in excess of the number reasonably required, (b) paying money in lieu of employing such an excess number of persons, (c) paying more than once for services performed, (d) paying money for services not performed, and (e) paying a tax for the privilege of using certain articles or operating certain machines or agreeing to restrictions upon their use." 93 Cong. Rec. 6601 (June 5, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1540 (1948).

On June 12, 1947, Senator Taft submitted a supplementary analysis of the bill to address concerns raised by the Senate. In explaining proposed Section 8(b)(6), that Report explained:

It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or need, to demand any money for their time. Of course this section does not affect such industrial practices, as such activities are *done at an employer's request* and for valuable consideration incident to the employment itself. The use of the words "in the nature of an exaction" make it quite clear that *what is prohibited is extortion by labor organizations or their agents in lieu of providing services which an employer does not want.*

93 Cong. Rec. 7001 (June 12, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1624 (1948) (emphasis added).

Because the constitutionality of the Lea Act forbidding featherbedding under the Communications Act was pending in this Court in *United States v. Petrillo*, 332 U.S. 1 (June 23, 1947), at the time of the debate, the Senate conferees were wary of making the changes, yet agreed to the House bill with one change. 93 Cong. Rec. 6693 (June 6, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT,

1947, at 1540 (1948). Subsequently, in *Petrillo*, this Court held that the criminal information against Petrillo was valid.

The President's intervening Veto message to the Congress stated that he saw the following problem with the approved featherbedding prohibition:

2. The bill arbitrarily decides, against the workers, certain issues which are normally the subject of collective bargaining, and thus restricts the area of voluntary agreement.
- (3) The bill presents the danger that employers and employees might be prohibited from agreeing on safety provisions, rest-period rules, and many other legitimate practices, since such practices may fall under the language defining "featherbedding."

93 Cong. Rec. 7500 (June 20, 1947), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 916-17 (1948).

On June 23, 1947, Senator Ball explained that the provision applied "only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another stand-by orchestra, which does no work at all." 93 Cong. Rec. 7683 (June 23, 1947), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1639. (1948). The President's veto was overridden that same day. *Id.* at 1656.

Rather clearly, the essence of avoiding the featherbedding provision is for the payment of wages to a person who performs work for the benefit of the employer and, in consideration, is paid only once. The payment of ongoing wages of \$50,000.00 a year to union officials who perform no ongoing work for Caterpillar fails this test. App. at 79a. This distinction is especially important, because unlike a pension payment to a former worker, the union insists that it can bargain for specific wage increases for its union officers (who are former Caterpillar employees) as often as it wishes. *Id.* Yet, wage increases have to relate to work "to be

performed" for the employer under Section 8(b)(6) as Senator Taft explained. The "wages" the union seeks here are not for the performance of any work for Caterpillar, but are for the benefit of the union membership in reduced salary payments for union officers. The Third Circuit would adopt the reasoning of the President's veto message that a union contract exempts violations.

The history of the Act set forth above was examined by this Court in *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953). There, Court found that limited "bogus" work actually performed by employees was not featherbedding prohibited by the Act because the statutory "condemnation" is limited to "instances where a labor organization or its agents exact pay from an employer for services not performed." *Id.* at 110. Because the extra (unneeded) work was indeed performed by the employees in *American Newspaper*, the practice was found not prohibited.⁴ Here, there is no work that can be performed by full-time union officials for Caterpillar, not even the make-work that this Court had accepted in *American Newspaper*.⁵

⁴Three members of the Court dissented. Justice Douglas found the practice "not only unwanted, it is indeed wholly useless....In no sense that I can conceive is it a 'service' to the employer....No matter how time-honored the practice, it should be struck down if it is not a service performed for an employer." 345 U.S. at 112. Mr. Justice Clark and Chief Justice Vinson also dissented and concluded that: "[a]n interpretation of 'services' in § 8(b)(6) to exclude contrived and patently useless job operations not to the employer's benefit could effectuate the legislative purpose." *Id.* at 115.

⁵The Third Circuit also makes the off-hand reference to employer payments for coterminous jury duty and National Guard service that employees might receive as if they are equivalent activities which demonstrate why the payments to full-time union officials should continue. App. 9a. The reasoning of the court of appeals is not supported by the references. In both instances, the call to jury duty and the call to active duty in the armed forces is an involuntary one for which the employee is compelled to serve on penalty of imprisonment. In both cases, the term of service is very short. For jury duty it is from one day to several weeks. For National Guard service it is for two weeks per year and one weekend a month. In both cases, the government releases the worker back to his/her full-time employment. Both fulfill citizenship duties that employers are

(continued...)

Congress did not find its 1947 prohibitions entirely sufficient. In the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), the Congress amended Section 302 to strengthen its financial prohibitions and to establish the validity of a cause of action against union officers for conflicts of interest. 29 U.S.C. § 440. Specifically, the LMRDA required union officers to file a report with Secretary of Labor each year detailing "any income or any other benefit with monetary value (including reimbursed expenses) which he...derived directly or indirectly from, an employer whose employees such labor organization represents..." 29 U.S.C. §432(a). See Analysis of the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare (Sept. 10, 1959), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE OF 1959, at 947, 951 (1959) (identifying requirement to report any "'conflict of interest' transactions, and any income or other benefits with monetary value derived therefrom.>").

This Analysis also explained that legitimate payments under Section 302 is "by an employer to any of his employees as compensation for their services as employees." *Id.* at 962. It also identifies a distinction between payment "as compensation for, or by reason of, his services as an employee" with "payments to trust funds for the purpose of pooled vacation, holiday, severance, or similar benefits or defraying costs of apprenticeship or other training programs." *Id.* at 963. This difference is important since the concept of deferred benefits was not intended to apply to the "by reason of" language used in Section 302(b). Hence, "compensation" for contemporaneous services rendered "as an employee" are permitted, while health and welfare and "similar" deferred group benefits may also be paid. The payments to union officials here fits

⁵(...continued)

compelled to support and receive the benefit of better trained personnel from the military service and more experienced workers from jury duty service to the community. To encourage both activities, an employer may provide supplemental income to these employees on their short tours of governmental service. Financial support for full-time duty in the service of the private labor organization (its antagonist), is entirely different.

neither category (wages or shared group benefits) and therefore are not permitted by express terms of the Act.

If the case below stands, the scenario of this case could result in a nationwide practice. In many respects it is indistinguishable from a case under the Act like *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987). There, the employer paid union business agent Gruttadauro for five union cards over a period of years to fend off unionization by other unions. In the meantime, the employer did not sign any agreement with the Laborers' Union that Gruttadauro represented or did Gruttadauro provide the employer with any employee services. Mr. Gruttadauro was convicted for violating Section 302(b)(1) of the Act.

The problem presented by the decision below is establishing the point where and when an employer can be forced to pay wages for full-time union officials. Removal of the "bright line" by the Third Circuit introduces innumerable permutations and uncertainty. Must former employees have worked for the employer when a special clause permitting future officer payments was first adopted? Must the official actually have been an employee of the employer? For how long? Apply one day, get hired, and then quit the next?⁶ Can the union and employer agree to make these payments in its first collective bargaining contract with union officials? Does the agreement have to be in a collective-bargaining agreement at all or may it be contained in one of thirty private side-letters. Petition at 26 n.37. Will such side-agreements be made public to the bargaining unit?

Because the Third Circuit used the "by reason of" language to validate these payments, the entire statutory purpose behind Section 302(c)(1) can now easily be sidestepped. The strong national interest in strict prohibition of employer money flowing into the pockets of elected union officials caused a legislative veto override in order to ensure union loyalty to workers. That specific national

⁶See *NLRB v. Town & Country Elec., Inc.* 116 S. Ct. 450 (1995) (union officials protected by Section 7 to apply for work as employees).

goal is jeopardized by the ruling below that fails to serve the legislative goal that rejected the President's veto terms.

Accordingly, this case presents the Court with an opportunity to further clarify and strengthen the purpose of Sections 302 and 8(b)(6) of the Labor Act and to resolve the conflict in the Circuit Courts represented by the opinion of the Third Circuit.

II. THE CONCEPT THAT ALL BARGAINING UNIT EMPLOYEES TRADED PAST ECONOMIC BENEFITS FOR POSSIBLE FUTURE WAGE PAYMENTS AS A UNION OFFICIAL IS A LEGAL FICTION THAT MUST BE DISAVOWED BY THE COURT TO VINDICATE THE PURPOSE OF SECTION 302(c)(1)

The Third Circuit supports its revolutionary decision under Section 302 of the Labor Act by arguing that there had been an economic trade by all unit employees for the "promise that, if he or she could someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." App 10a.

The error in this reasoning is highlighted by Judge Mansmann in her dissent. It is important to recognize that the Third Circuit majority's statement is inherently illogical because it fails to identify the fact that the Union is but a majority bargaining representative. Therefore, whenever the Union attempts to provide itself with direct benefits, it knows that the non-union members of the bargaining unit will not be able to vote to approve the contract and therefore to object to the provision. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

Furthermore, no non-union member of the bargaining unit can ever be elected a union official. Thus, to argue that the trade-off of current wages and benefits was made to secure the promise of payments by Caterpillar if the employee became an elected official is not a convincing possibility.

Yet, the Third Circuit majority's reliance on this trade-off implicates the union's duty of fair representation toward the non-

member employees who receive no possible benefit from a wage transfer to union officials. Since the Third Circuit called these payments a "benefit," App. 10a, they must be examined as a charge against employees just as much as union dues are chargeable and for which objecting non-union employees have the right to seek a reduction in forced union dues.

Moreover, this type of bargaining activity poses serious questions under the Union's duty of fair representation. In trading off union salary amounts that would otherwise be apportioned to collective bargaining activities against union dues (to be paid by objecting agency fee payers from their take-home wages), the union proportionally increases the amount of support it receives from agency fee payers to support collective bargaining activities by hiding their "contributions" in the union officer's pay provision.

In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) ("Beck"), the Court found that a union violates the duty of fair representation not only when it *expends* money on purposes unrelated to collective bargaining, but when it *exacts* and *collects* full union dues: "§8(a)(3) . . . authoriz[es] the collection of only those fees necessary to finance collective bargaining activities." *Beck*, 487 U.S. at 759 (1988).

The Third Circuit confounds the essence of the fair representation obligation by stating that the act of negotiating direct union salary benefits from the employer, as well as a union security clause requiring all members to pay union dues and initiation fees, is lawful under the terms of Section 8(a)(3). It must further accept the proposition that the negotiation of union officer salary compensation cannot be accomplished in an arbitrary, discriminatory or bad faith manner constituting a breach of its duty of fair representation.

This Court in *Beck* used express language to state that not only is the duty of fair representation violated when a union "exacts" money in excess of germane collective bargaining expenses, *Beck*, 487 U.S. at 759, but it is a *per se* violation of *Beck* and § 8(a)(3) to exact more. Since Section 8(a)(3) is an employer violation of the Act, *amicus curiae* reads § 8(a)(3) as prohibiting the employer from

agreeing (or conspiring) with the union to violate the Act. Caterpillar has properly reassessed its past activities and chosen to cease engaging in violations of the Labor Act and interference with employee rights.

In fact, the activities for which compulsory unionism is permitted to defray expenses are those found in § 8(d) of the NLRA. The *Beck* Court repeatedly emphasized the requisite nexus between collective bargaining contracts and the cost chargeable under the statute:

The statutory question presented in this case, then, is whether [§ 8 (a)(3)] includes the **obligation to support** union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. *We think it does not.*⁷

We conclude that § 8 (a) (3) . . . authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'⁸

The mere act of negotiating union salary payments and a union security clause, like that found in the parties former agreements, also does not consider the fair representation claim. *Amicus curiae* respectfully submits that by negotiating the union salary clause as well as a union security clause, and demanding and obtaining dues and fees from objecting non-union employees under threat of discharge, the UAW violates its statutory duty of fair representation owed to those objecting employees.

When this argument is correctly understood, the Center submits that the Unions' actions are not only *arbitrary, discriminatory and in bad faith*, as a matter of law, but also contrary to the Unions'

⁷*Beck*, 487 U.S. at 745 (emphasis added.).

⁸*Beck*, 487 U.S. at 762-63.

exclusive bargaining agent responsibilities "to serve the interest of all members without hostility ... and to exercise its discretion with complete good faith and honesty" *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967). A duty to represent employees fairly with respect to statutorily defined activities necessarily implies a duty not to represent them otherwise. For an assertion of non-existent representational powers is always "unfair," or discriminatory, and arbitrary; and inferentially motivated by bad faith.

By demanding that plaintiffs pay through reduced wages more than their fair share of official union costs, the unions divert non-objecting employees' money from the "collective bargaining budget" to the union's "institutional budget." *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963)(NLRA case); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961)(an RLA case). Thus, "[b]y paying a larger share of collective bargaining costs [plaintiffs] subsidize the union's institutional activities" and diminish their own expression. *Schermerhorn*, 373 U.S. at 754. This result is a perversion of § 8(a)(3) just as it is a perversion of § 2, Eleventh in the RLA setting. *See Lykins v. Aluminum Workers International Union*, 510 F. Supp. 21, 26-27 (E.D.Pa. 1980)(§ 8(a)-(3) condemns expenditure of dissenters' money for ideological purposes).

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), the Court faced the question whether an exclusive representative could discriminate against nonunion employees. The Court readily found "governmental action" sufficient to raise constitutional issues: "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitation on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

The questions were avoided by statutory construction there. Here, under the Third Circuit's construction, adopted in *Beck*, the Court faces the issue. The Court in *Steele* concluded that the Act,

imposes on the ...representative...*at least* as exacting a duty to protect equally the interests of the members of the craft *as the Constitution* imposes upon a legislature to give equal protection to the interests of those for whom it legislates. *Congress has seen fit to clothe the representative with powers comparable to those possessed by a legislative body* both to create and restrict the rights of those whom it represents, ...but it has also imposed on the representative a corresponding duty. *Id.* at 202 (emphasis added).

These issues play a significant role under the Labor Act and protect the guaranteed right of employees under Section 7 of the Act to voluntarily choose their union membership. However, when they are forced to subsidize union salaries by direct reduction of their potential wage gains, rather than through proof of the union's cost of collective bargaining, their voluntary "membership" rights are undermined. These interests deserve to be considered fairly by the Court. The lack of consideration by the court majority below presents a grave threat to the Statute heretofore protected by this Court.

CONCLUSION

WHEREFORE, for the important reasons set forth above, the Center on National Labor Policy, Inc., respectfully requests that this Honorable Court grant the Petition for the purpose of reversing the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: August 6, 1997

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①

No. 96-1925

Supreme Court, U.S.

FILED

NOV 13 1997

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated
LOCAL UNION 786,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 2, 1997
CERTIORARI GRANTED SEPTEMBER 29, 1997

13588

TABLE OF CONTENTS

	<i>Page</i>
Chronological List of Relevant Docket Entries	1
Excerpts from Collective Bargaining Agreement:	
Central Agreement between Caterpillar and UAW	2
Local Supplement for the York Plant and Local 786	43
Letter from Caterpillar to UAW, dated Oct. 30, 1992	48
Affidavits and Written Declarations:	
Affidavit of Terry Orndorff, dated May 3, 1993	54
Declaration of Pat Greathouse, dated Oct. 13, 1995	57
Affidavit of Gerald Lazarowitz, dated Oct. 17, 1995	63
Second Affidavit of Terry Lee Orndorff, dated Oct. 18, 1995	64
Declaration of Terry Lee Orndorff, dated Nov. 1, 1995	67
Excerpts from Oral Depositions:	
Deposition of Terry Orndorff, dated Sept. 20, 1995	82
Deposition of Harold Booze, dated Sept. 21, 1995	90

Opinion of District Court, dated Dec. 8, 1995	Pet. App. 49a
Order of District Court, entered Dec. 8, 1995	Pet. App. 63a
Judgment of District Court, entered Dec. 8, 1995	Pet. App. 64a
Order of Court of Appeals listing case for rehearing en banc, entered on Oct. 11, 1996	Pet. App. 47a
Opinion of Court of Appeals, dated March 4, 1997	Pet. App. 1a
Judgment of Court of Appeals, entered on March 4, 1997	Pet. App. 45a
Order of this Court granting petition for certiorari, entered Sept. 29, 1997	132

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Middle District of Pennsylvania, dated December 8, 1995	49a
Order of the United States District Court for the Middle District of Pennsylvania, entered on December 8, 1995	63a
Judgment of the United States District Court for the Middle District of Pennsylvania, entered on December 8, 1995	64a
Order of the United States Court of Appeals for the Third Circuit listing the case for rehearing en banc, entered on October 11, 1996	47a
Opinion of the United States Court of Appeals for the Third Circuit, dated March 4, 1997	1a
Judgment of the United States Court of Appeals for the Third Circuit, entered on March 4, 1997	45a

**CHRONOLOGICAL LIST
OF RELEVANT DOCKET ENTRIES**

Dec. 22, 1992—Plaintiff Caterpillar's complaint filed in the U.S. District Court for the Middle District of Pennsylvania.

Jan. 25, 1993—Defendant UAW's original answer filed.

Feb. 3, 1993—Defendant Local 786's original answer filed.

May 1, 1995—Defendant UAW's amended answer and affirmative defenses filed.

May 1, 1995—Defendant Local 786's amended answer and affirmative defenses filed.

Oct. 19, 1995—Plaintiff Caterpillar's motion for summary judgment filed.

Oct. 19, 1995—Defendants UAW and Local 786's motion for summary judgment filed.

Dec. 8, 1995—Judgment of District Court entered, granting Plaintiff Caterpillar's motion for summary judgment and denying Defendants UAW and Local 786's motion for summary judgment.

Jan. 5, 1996—Defendants UAW and Local 786's notice of appeal filed.

Aug. 8, 1996—Oral argument heard before panel of the U.S. Court of Appeals for the Third Circuit.

Oct. 11, 1996—Order of U.S. Court of Appeals for the Third Circuit, listing case for rehearing en banc.

Mar. 4, 1997—Opinion and judgment of U.S. Court of Appeals for the Third Circuit, reversing judgment of U.S. District Court for the Middle District of Pennsylvania.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

Caterpillar Inc., Plaintiff

v.

International Union, United Automobile, Aerospace
and Agricultural Implement Workers of America and
its affiliated Local Union 786, Defendants

[EXCERPTS FROM THE CENTRAL AGREEMENT]

CENTRAL AGREEMENT
between
CATERPILLAR INC.
and the
UAW
OCTOBER 21, 1988

This Booklet also contains the
LOCAL SUPPLEMENT
for the
YORK PLANT
and
LOCAL UNION 786
OCTOBER 21, 1988

ARTICLE 1

Purpose

(1.1) The purpose of this Agreement is to establish harmonious relations between the parties and to facilitate orderly adjustment of grievances, complaints, and disputes which may arise from time to time between the Company and the Union. This Agreement is entered into in consideration of the mutual performance thereof in good faith by the parties.

(1.2) The parties agree that wherever words such as "he," "him," "his," "Committeeman," "Foreman," or similar words appear in this Agreement, appended Letters of Agreement, Exhibits, Local Agreements, or Agreements and Plans relating to Pensions, Group Insurance, Supplemental Unemployment Benefits, Employee Stock Ownership, Profit Sharing and Tax Deferred Savings Plan, it is understood that such words are considered asexual and refer to females and males equally.

ARTICLE 4

Representation

(4.1) In order to provide a system of Union Representation for the processing and settlement of grievances the Committee representation structure for each Local shall be as set forth in this Article 4. The duties and privileges of such representatives, except the Chairmen in Local Unions Nos. 145, 751, 786, 974, and 209 shall be set forth in the appropriate Local Supplement.

A. Aurora Local No. 145

1. A Plant Grievance Committee composed of nine (9) employees, one of whom shall be the President of Local No. 145, one of whom shall be the Chairman of the Bargaining Committee, and seven of whom shall be elected from among the employees within the bargaining unit.

The Chairman of the Bargaining Committee shall perform the functions of his office in accordance with Section 4.6 of this Agreement.

2. International Representatives of the Union (not to exceed two (2)) may assist the Plant Grievance Committee at the third step of the grievance procedure.
3. The Committeeman shall represent employees as follows: One Committeeman to represent employees in Building H; one Committeeman to represent employees in Building B; one Committeeman to represent employees in Building G; one Committeeman to represent employees in Plant Engineering; one Committeeman to represent employees in Tool Room/Prove Design/Machine Repair/Tools and Supplies/Heat Treat; one Committeeman to represent employees in Inspection, Building B Assembly and Building K; one Committeeman to represent employees in Material Control.

B. Decatur Local No. 751

1. A Plant Grievance Committee composed of a maximum of eight employees who shall be

elected from among the employees within the bargaining unit.

2. A Chairman of the Grievance Committee elected from among employees in the bargaining unit, who shall perform the functions of his office in accordance with Section 4.6 of this Agreement.
3. Six (6) Committeemen shall represent employees as follows: one Committeeman to represent employees in Assembly; one Committeeman to represent employees in the Machine Shop; one Committeeman to represent employees in Materials; one Committeeman to represent employees in Plant Engineering, Tool Room, Prove Design and Machine Repair; one Committeeman to represent employees in Quality Control, Tools and Supplies; and one Committeeman to represent employees in Fabrication.
4. Two additional Committeemen may, at the request of the Union be elected to represent employees in areas mutually agreed to by the parties.

International Representatives of the Union may assist the Plant Grievance Committee at the Third Step Grievance Meeting.

C. York Local No. 786

1. Nine plant Committeemen shall be elected to represent bargaining unit employees as follows: Three Committeemen elected to represent first shift employees in Bldgs. C and J; D; B, E, N, P, S and Z in areas mutually agreeable to the

parties; three Committeemen elected to represent second shift employees in Bldgs. C and J; D; B, E, N, P, S and Z in areas mutually agreeable to both parties; three Committeemen elected to represent third shift employees in Bldgs. C and J; D; B, E, N, P, S and Z in areas mutually agreeable to the parties.

Additionally, an Alternate Committeeman shall be elected from among employees in the bargaining unit and shall perform his duties in accordance with the Local Supplement.

A Chairman of the Grievance Committee shall be elected from among employees in the bargaining unit and shall perform the functions of his office in accordance with Section 4.6 of this Agreement.

2. A Plant Grievance Committee composed of the President, Chairman and not more than nine Committeemen.
3. An International Representative of the Union may assist the Plant Grievance Committee at the Third Step of the grievance procedure, or the Review Committee at the Fourth Step.

D. Peoria Local No. 974

There shall be 14 Third Step Grievance Committees as herein set forth. One full-time member of each Third Step Grievance Committee shall be the Chairman. The number of full-time Committeemen, one of whom shall be the Chairman, and the number of part-time Committeemen on each Committee shall be as follows:

Plant or Zone	No. of Part-Time Committeemen	No. of Full-Time Committeemen
East Peoria Plant		
Bldg. HH	2	1
Bldgs. KK & SS	2	2
Bldgs. LL & NN	2	1
Tool Room	1	2
Plant Engineering	2	1
Material Control & Transportation	2	1
Bldgs. J thru X	2	1
Mapleton Plant	2	2
Morton Plant	2	2
Mossville Plant	2	1
Bldgs. BB & CC		
Bldg. B	2	1
Bldg. DD	2	1
Technical Center	2	1
Chemical Products Manufacturing	1	2

The Chairman of each Committee shall be assigned to the first shift and shall perform the functions of his office in accordance with Section 4.7. The full-time Committeeman, other than the Chairman, shall perform his duties in accordance with the Peoria Local Supplement.

There shall be one Bargaining Committee made up of the Chairman of each Third Step Grievance

Committee or his alternate; the President or Acting President of the Local Union; the Bargaining Chairman; and Representatives of the International Union.

Modification in this general arrangement heretofore provided in this Article may be made by mutual written agreement in order to provide adequate representation and to facilitate the handling of individual grievances.

E. Denver Local No. 1415

A Grievance Committee shall be composed of five employees, one of whom shall be the President of the Local who shall serve as Chairman of the Second Step Grievance Committee, and three stewards, two from first shift, one from second shift and one from third shift. The Company agrees to pay for regularly scheduled hours for up to two stewards.

An International Representative of the Union may assist the Grievance Committee at the Second Step of the grievance procedure.

In addition to performing the duties and privileges set forth in the foregoing provisions of this Section 4.1 (E) and/or Denver Local Supplement, the President of the Local Union may conduct Union business without loss in pay for regularly scheduled hours for a maximum of eight hours per week.

F. Memphis Local No. 1989

A Grievance Committee composed of four employees, one of whom shall be the President/Bargaining Chairman of the Local, one of whom shall be

elected among the employees on first shift, one of whom shall be elected among the employees on second shift, and one of whom shall be elected among the employees on third shift. The employee elected to serve as President/Bargaining Chairman of the Local Union shall be assigned to the first shift, provided there is work available that the President/Bargaining Chairman can perform without being trained.

If a Committeeman is absent, the President/Bargaining Chairman may function in place of such Committeeman in the grievance procedure. If such absence is going to be for a full day or more, an alternate Committeeman will be permitted to function in the grievance procedure provided the Company is given one workday prior notification.

An International Representative of the Union may assist the Grievance Committee at the Second Step of the grievance procedure.

In addition to performing the duties and privileges set forth in the foregoing provisions of this Section 4.1(F) and/or Memphis Local Supplement, the President/Bargaining Chairman of the Local Union may conduct Union business without loss in pay for regularly scheduled hours for a maximum of eight hours per week.

G. Pontiac Local No. 2096

A Grievance Committee composed of five employees, one of whom shall be the Bargaining Chairman of the Local; one of whom shall be elected from among employees in the Tooling/Tool Grinding and Plant Engineering Non-Interchangeable

Occupational groups and shall be an employee within the groups he represents; one of whom shall be elected from among the other employees on first shift; one of whom shall be elected from among the employees on second shift; and one of whom shall be elected from among the employees on third shift. The employee elected to serve as Bargaining Chairman of the Local Union shall perform the functions of his office in accordance with Section 4.6 of this Agreement. The Committeeman elected from each shift shall be an employee within the shift he represents.

If a Committeeman is absent, an alternate Committeeman will be permitted to function in the grievance procedure provided the Company is given a one workday prior notification.

An International Representative of the Union may assist the Grievance Committee at the Third Step of the grievance procedure.

(4.2) Union Representatives will handle grievances with least possible interference with production and efficient operations. Consistent with the foregoing provisions of this Article 4, Union Representatives are granted certain privileges for which they are paid as set forth in this Agreement and the appropriate Local Agreements. The Company will not be required to pay Union Representatives in any instance where:

1. A Union Representative fails to follow or observe the provisions setting forth such privileges, or
2. The amount of time spent in the exercise of such privileges is unreasonable.

In order to administer the above provisions in a consistent and fair manner and to establish the amount of time involved in any dispute arising therefrom, a Union Representative will secure a pass as provided in Section 4.3 of this Agreement.

In any case involving a Steward or Committeeman other than the Chairman, in which pay is denied, the Company will notify the Chairman of the appropriate Final Step Grievance Committee of such pay denial and the reason therefor. Any dispute arising from such pay denial may be taken up as a grievance which shall be presented directly to the Final Step of the appropriate Local grievance procedure. Prior to the Final Step meeting at which such dispute will be discussed, the Chairman of the Final Step Grievance Committee and the Labor Relations Manager (or his designated representative) may conduct a joint investigation of such pay denial which shall include hearing statements from the Management representative and the Union Representative involved as to the circumstances of such pay denial.

The foregoing provisions of this Section shall not be applicable to Local 974.

In Local 974, Union Representatives will handle grievances with least possible interference with production and efficient operations. If in any instance the Company feels that such privileges are being abused, it shall so notify the Local Union, in writing, and in the event the abuse is not then corrected, or an understanding not reached, the Company may suspend the privileges of the Union Representative involved. Any dispute arising therefrom may then be taken up under the grievance procedure.

The Company agrees that the provisions of Sections 4.2 or 4.3 will not be administered in such a manner that Union Representatives will be denied the privileges granted Union Representatives in the performance of the functions permitted such representative under this Agreement or the appropriate Local Agreement.

(4.3) If, in the handling of a grievance in accordance with the provisions of this Agreement, or the appropriate Local Agreement, it is necessary for an employee or a Union Representative to leave his line, unit or immediate working area, the employee or Union Representative shall secure a pass from his immediate Supervisor. Such pass shall indicate the reason for the issuance of the pass and the area or areas which the Union Representative is authorized to enter. The Union Representative will present the pass to the Supervisor of the area for which the pass was issued and indicate the employees he wishes to contact.

(4.4) Each Local Union shall provide the Company with a list of all Union Representatives, members of Grievance Committees, members of the Bargaining Committee, and officers of the Local Union. Each Local Union shall notify the Company of any changes in this list as promptly as possible. The Company agrees to provide each Local Union with a list of supervisory employees, by departments and shifts, who are authorized and designated to handle grievances under the local grievance procedure. The Company shall notify the Local Union of any changes in this list as promptly as possible.

(4.5) Upon request to a Plant Labor Relations Department, International Representatives of the Union (not to

exceed two) shall be granted permission to visit a plant during working hours for the purpose of investigating any specific grievance which is pending the Final Step of the grievance procedure, or which is scheduled to be heard at an arbitration hearing, and the proper investigation of which requires entry into that plant. The Company will acknowledge the request and will set a time which is mutually agreeable for such visit. A member of the Final Step Grievance Committee and the Local Union President and Chairman of the Local Bargaining Committee may accompany the International Representative(s) during such visit.

Management representatives may accompany the Union Representative(s) during such visit. Such visits shall be of reasonable duration, and during these visits the International Representative(s) may interview the aggrieved employee or employees, provided the interviews do not materially interfere with production and efficient operation. The International Representative(s) shall be subject to all plant rules and regulations while engaged in such visit.

(4.6) Except in Local No. 974, the provisions of this Section 4.6 will apply only to bargaining units in which the parties have agreed a full-time Chairman will be paid by the Company as hereinafter set forth.

The privileges granted to the Chairman of the Grievance Committee are: (1) act in place of an absent Committeeman; (2) serve as a Committeeman for a specific area, plant or location if the appropriate Local Agreement so provides; (3) investigate grievances pending the Third and/or Final Step of the grievance procedure if permitted under the appropriate Local Agreement pro-

vided no other Committeeman has made such an investigation for such purpose; (4) discuss Third and/or Final Step grievances with Company representatives as provided in the Third and/or Final Step of the appropriate grievance procedure; (5) participate in joint investigations agreed to in a Third and/or Final Step Grievance meeting; (6) consult with the Regional Director of the International Union, or his designated representative, on the disposition of any grievance denied in the Third and/or Final Step of the grievance procedure and/or to prepare a statement of all facts and circumstances on a grievance that will be forwarded to the UAW-Agricultural Implement Department, if such be the case. Such Chairman will exercise only the privileges above set forth or those which have otherwise been mutually agreed upon.

The Chairman of the Grievance Committee shall conduct his business from the Local Union office. He shall be considered to be on a leave of absence and will be paid by the Company for his regular shift hours during the regular workweek (excluding Saturdays, Sundays and holidays) that employees in his jurisdiction are scheduled to work, provided, however, the Company shall not pay for time spent in (i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union office, or (iv) any activity not directly related to the functions of his office. Any such Chairman who spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay for such. He shall be paid for all such hours at the regular straight-time hourly rate he was receiving just prior to his election adjusted for general increases

and cost-of-living adjustment amounts, if such there be, as provided in Article 18 of this Agreement. He shall be eligible for time off and/or payments in accordance with Articles 9, 10, 15 and 20 of this Agreement, provided such Chairman will not receive payment for the same day under more than one of the provisions of this Central Agreement. For purposes of the Supplemental Agreement relating to Non-Contributory Pension Plan, the Group Insurance Plan attached to the Insurance Plan Agreement, and the Supplemental Unemployment Benefit Plan, such Chairman will have the same coverage as though he was actively at work.

The Chairman of the Final Step Grievance Committee will be issued a permanent pass, valid for his term in office, to be used to gain entrance to the plant (except those areas designated as being restricted by the Company) and for the performance of the privileges granted to him pursuant to this Section 4.6. Entrance to restricted areas may be gained only with prior approval from the Plant Labor Relations Department. Upon entry into the Plant, the Chairman will immediately present such pass to the area Supervisor and state the purpose of his visit before exercising any of the privileges specifically granted. The Chairman will conduct his business with the least possible interference with production and efficient operations. This pass will be issued through the Labor Relations Department and will remain in effect provided it is used only in accordance with this provision.

When it is necessary for the Chairman to be absent for a full day or more, he may be replaced by an Alternate who will function as hereinbefore set forth, provided the Company is notified in advance of such absence.

(4.7) In Local 974, the privileges of the Chairman of the Third Step Grievance Committee are: (1) serve as a Committeeman; (2) act in place of an absent Committeeman; (3) function as described in (1) above with regard to Step 3 grievances in his jurisdiction on any shift at locations outside of the geographical area of his zone or plant; (4) consult with the Regional Director of the International Union, or his designated representative, on the disposition of grievances denied in the Final Step of the grievance procedure and/or to prepare a statement of all facts and circumstances on a grievance that will be forwarded to the UAW-Agricultural Implement Department, if such be the case. The Chairman shall exercise only those privileges above set forth or those which have otherwise been mutually agreed upon.

If in the performance of the above it is necessary for the Chairman of the Third Step Grievance Committee to leave his assigned work location, he shall log out and obtain a pass from a designated Company representative. The Chairman will present such pass to the area Supervisor before exercising any of the above listed privileges and will return the pass to the designated Company representative and log in when returning to his assigned work location. The Chairman shall exercise such privileges only during the regular workweek (excluding Saturdays, Sundays and holidays) provided, however, the Chairman may use such assigned work location to perform administrative clerical functions on Saturdays, Sundays and holidays. The Chairman shall be subject to all plant rules and regulations.

The Chairmen of the Third Step Grievance Committees shall be considered as on a leave of absence from the Company but shall be paid by the Company for their

regular shift hours during the regular workweek (excluding Saturdays, Sundays and holidays) of the zone or plant they represent but only for such hours that they are in such zone or plant exercising the privileges described in this Section 4.7 or duties in conjunction therewith (excluding all time spent in negotiations and/or arbitration). Each such Chairman who spends at least 8 hours per week in the plant exercising such privileges will receive an additional 6 hours pay for such week. They shall be paid for all such hours at the regular straight-time rate they were receiving just prior to the election (excluding night shift premium) adjusted for general increases and cost-of-living changes as defined in Article 18 of the Central Agreement. They shall be eligible for time off and/or payments in accordance with Articles 9, 10, 15 and 20 of the Central Agreement. For purposes of the Supplemental Agreement relating to Non-Contributory Pension Plan, the Group Insurance Plan attached to the Insurance Plan Agreement, and the Supplemental Unemployment Benefit Plan, such Chairmen will have the same coverage as though they were actively at work.

When it is necessary for the Chairman of a Third Step Grievance Committee to be absent from the zone or plant he represents, he shall notify the Company's designated representative in advance of such absence. If he is going to be absent for a full workday or more, he may be replaced for any such full workday of absence by his alternate who shall also be an employee from the zone or plant he represents.

The Bargaining Unit Chairman will be granted a permanent pass, valid for his term in office, subject to the provisions below that may be used to gain entrance

to all Company facilities (except those areas designated as being restricted by the Company) where bargaining unit employees are working. Entrance to restricted areas may be gained only with prior approval from the plant Labor Relations Department. Such pass may be used only for the purpose of entering the facility to see the Chairman of the Divisional Grievance Committee, Labor Relations Representative, or the designated Third Step Company Representative. This pass will be issued through the Labor Relations Department and will remain in effect provided it is used only in accordance with this provision.

(4.8) The appropriate Committeeman or Chairman will be permitted to discuss the final disposition of the grievance in the grievance procedure with the aggrieved employee.

ARTICLE 5

Grievance Procedure

(5.1) A grievance is defined to be any difference which may arise between the parties, or between the Company and an employee covered by this Agreement as to:

- a. Any matter relating to wages (except general wage adjustments) and including but not limited to merit increases, incorrect classification within a given occupation, or incorrect classification as to occupation, hours of work or working conditions, not covered by this Agreement; and
- b. Any matter involving the interpretation, application or violation of any provisions of this Agreement, appended Letters of Agreement or appropriate Local Agreement.

(5.2) It is mutually desired that grievances be satisfactorily settled as quickly as possible.

When a grievance arises, the employee shall identify the issue by indicating the specific action or nonaction on the part of the Company which prompts the grievance whereupon the Foreman shall, without undue delay, send for the Steward and an earnest effort will be made to settle the grievance in accordance with procedures provided in the Local Agreements.

The parties jointly recognize that it is desirable to resolve, if possible, any question of fact relevant to any grievance at as early a Grievance Step as is reasonably possible and will cooperate with each other in an effort to do so; such cooperation shall extend, in appropriate cases, to joint investigation to establish the relevant facts.

(5.3) Termination of any grievance in the First Step or, in locations having a Three or Four Step grievance procedure, the Second Step of the local grievance procedure, either by the Company granting relief in whole or in part or by the Union withdrawing or dropping the grievance, shall not constitute a precedent for the settlement of any future grievance in any Step of the grievance procedure or in support of either party's position in arbitration; however, any such "no precedent" termination shall not constitute an eradication of the events which led to the Company action or nonaction of which the grievance complained.

(5.4) No claims against the Company, including claims for back pay, by an employee covered by this Agreement, or by the Union, shall be retroactive to any period more than 12 months prior to the date the grievance was first filed in writing.

In the case of a discharged employee, all claims for back pay shall be limited to the amount of wages the employee would otherwise have earned from his employment with the Company, less the following:

1. Any Unemployment Compensation which the employee is not obligated to repay or which he is obligated to repay but has not repaid nor authorized the Company to repay on his behalf.
2. Compensation for personal services other than the amount of compensation he was receiving from any other employment which he had at the time he last worked for the Company and which he would have continued to receive had he continued to work for the Company during the period covered by the claim.

Wages for total hours worked each week in other employment in excess of the total number of hours the employee would have worked for the Company during each corresponding week of the period covered by the claim shall not be deducted.

(5.5) Employees shall be given disciplinary layoff, suspended from employment, or discharged only for just cause. In imposing disciplinary layoff, suspension or discharge on a current charge, the Company will not take into account any prior infractions (including falsification of employment application) which occurred more than three years previously nor, in the case of attendance infractions, any days of absence paid under Section 15.1 for which prior approval had been granted by the Company for such absence. In the event an employee has been given disciplinary layoff, suspended from employment, or discharged, his Foreman will send for the

employee's Committeeman to discuss, for such time as may reasonably be necessary, the case with the employee. In the event the employee's Committeeman is not available, the appropriate Union representative will be called.

Within a reasonable time (not to exceed 5 working days) after disciplinary layoff, suspension from employment or discharge has been imposed, either party may request that a disciplinary hearing be conducted by the appropriate Final Step Company representative. At the disciplinary hearing, the employee shall have the right to be present and the appropriate Committeeman shall have the right to represent him. If the parties mutually agree, witnesses may be jointly interviewed so the relevant facts can be ascertained. Employees at work who participate in a disciplinary hearing will not lose pay for regularly scheduled hours spent in such hearing.

Grievances involving disciplinary layoff, suspension or discharge may be presented, in writing, directly to the Final Step of the local grievance procedure. The Company must be notified of a claim of wrongful disciplinary layoff, suspension or discharge within fifteen calendar days after same occurs, and the case shall be taken up promptly and diligent efforts made to dispose of it.

(5.6) An employee who receives a warning will, where the act resulting in the warning would constitute cause for disciplinary action if continued, be given a written notice setting forth his name, badge number, date of the warning and the reason for the warning.

(5.7) If, in the Final Step of the local grievance procedure, the Union considers as unsatisfactory the Company's decision on a grievance which has as its basic issue

a medical disagreement wherein the findings of the Company's physician or physicians are in conflict with the findings of the employee's personal physician, the medical question shall be submitted to a third physician mutually agreed to by the parties within five working days following the Company's decision on such grievance. The medical opinion of the third physician after examination of the employee and consultation with the other two physicians shall resolve such conflict. A copy of the third physician's findings shall be supplied to both the Company and the Union. The expense of the third physician shall be paid one-half by the Company and one-half by the Union, each of whom will be billed separately by the third physician for their share of such expense.

Each Local Union may, at its option, develop with the Company a list of mutually agreeable physicians including specialists, and/or medical facilities to which such medical disputes may be referred.

* * *

ARTICLE 8

Health and Safety

(8.1) The Company, the Union and employees will cooperate toward the prevention of accidents and furtherance of a safety program. The Company will continue in its efforts to protect and promote the health of all employees. The Company will endeavor to maintain a clean, property lighted, heated and ventilated factory with approved safety devices and will maintain a well-equipped Medical Division at those plants where such is practical, or, alternatively will make arrangements for

medical services to be provided by a licensed physician at a reasonably convenient location.

(8.2) Each plant shall have a Safety Committee, composed of management and Union representatives, in accordance with the provisions of applicable Local Agreements. It shall be the duty of the Safety Committee to meet on a monthly basis without loss of pay for regularly scheduled hours. A copy of the minutes of such monthly meetings will be provided to members of the Safety Committee. Such minutes shall include: the date of the meeting, names of the individuals present, a brief statement of items discussed and the consensus of disposition, if any, reached on those items.

The functions and objectives of the Safety Committee will be:

- a. To encourage the observation of safety rules and the furtherance of the safety program.
- b. To review serious or unusual injuries and illness experienced within the plant and recommend possible corrective measures where appropriate.
- c. To review significant developments of mutual interest in the industrial health and safety field and consider the applicability of such developments to the plant.
- d. To review new manufacturing equipment and major process changes where employee health or safety may be affected and make appropriate recommendation.
- e. To review established and proposed safety procedures for recognized hazardous materials and physical hazards (noise, heat and radiation) to which

employees are exposed and make appropriate recommendations.

- f. To review significant changes in the Company's health and safety programs due to legal requirements or Company-initiated revisions. The Company will supply this information to the Committee in advance of implementation to allow sufficient opportunity to discuss these programs and make appropriate recommendations for improvement.
- g. To review and recommend safety-related improvements in current safety training programs, such as vehicle operator safety training, machine operator safety training and hazardous material training.

(8.3) Safety Procedure

Stage 1: An employee who believes that a condition has developed which presents a significant threat to his safety should promptly notify his Foreman of such condition. The Foreman shall determine, as promptly as possible, whether such condition represents a significant threat to the safety of the employee or employees involved and, if indicated, initiate appropriate corrective measures.

Stage 2: If a satisfactory solution to the problem cannot be agreed upon in Stage 1, the employee may request and the Foreman shall, without undue delay, send for the Safety Subcommitteeman (if such there be) in whose jurisdiction the condition exists for the purpose of conducting a Stage 2 joint investigation of the problem with the Foreman. Such investigation may also receive the attention of the General Foreman (if such there be). At plants where Safety Subcommittees have not been established, the Safety Committeeman in whose jurisdic-

tion the condition exists will be called initially as provided herein.

Stage 3: If a satisfactory solution to the problem cannot be agreed upon in the foregoing Stage 2 joint investigation, the investigation may be broadened at that time, if the Union Safety Subcommitteeman or Committeeman, as the case may be, so requests of the Foreman, by the addition of (1) the Chairman of the Union Safety Committee (in the Peoria area, the Divisional or Plant Safety Committeeman, and in the Decatur Plant the Safety Committeeman, in whose jurisdiction the condition exists), (2) the Superintendent of the area, or his designated representative, and (3) the Company Safety Supervisor or his designated representative. It is understood that the Union representatives specified in (1) above will have designated alternates on the other two shifts who will function in their stead on shifts other than the shifts on which the representatives specified in (1) above work and that the Company will have been notified of these designated alternates. If a satisfactory solution to the problem is not arrived at within 3 working days the employee will be notified of the status of his complaint.

Stage 4: If a satisfactory solution to the problem has not been agreed upon at the conclusion of the Stage 3 joint investigation, a grievance may be filed directly, within five working days, to the Final Step of the grievance procedure by the member of the Final Step Grievance Committee within whose jurisdiction the alleged unsafe condition exists, and such grievance thereafter may be processed through the grievance procedure and, if not resolved, to arbitration.

Prior to the submission of the written grievance, the above designated member of the Final Step Grievance

Committee may discuss the safety problem with the appropriate Safety Committeeman provided that the Grievance Committeeman notifies the appropriate Final Step Company representative that the safety problem is being referred to the grievance procedure.

Union Safety representatives specified in (1) of Stage 3 of this Section 8.3, if desiring to investigate or discuss a condition of safety other than as provided above, may request their Supervisor to notify the Company Safety Supervisor. The Safety Supervisor, or his designated representative, upon such notification, will meet the Committeeman at his place of work to discuss the matter involved or, if mutually desired, to jointly investigate the condition in question.

Notwithstanding the above, and in addition to the other provisions of this Section, if a condition or practice comes to the attention of a Safety Committeeman which he believes to constitute a serious hazard which immediately imperils the health or safety of an employee or employees, the Safety Committeeman is authorized to bring such condition or practice to the attention of the Factory or Division Manager or, if he not be present, to his designated representative, forthwith.

It is understood and agreed that conditions challenged as unsafe, safety complaints, alleged violations of the safety provisions of this Agreement, etc., will not be processed through the First or Second Steps of the grievance procedure.

Nothing in this Section 8.3 shall be construed to restrict the employee's rights under Section 502 of the Labor Management Relations Act of 1947.

(8.4) Whenever a physical examination or laboratory test has been made of an employee by physicians acting for the Company, a report thereof will be given to the employee and/or the personal physician of the employee involved upon the written request of such employee. However, if such examination or test discloses an abnormal condition, the employee will be so advised.

The Company will provide pulmonary function tests for Foundry employees, as deemed necessary by the plant Medical Director. For those employees who, because of the nature of their work, are required by the Company to wear respirators, the Company will provide medical evaluations of the respiration functions on at least an annual basis.

Once during the term of the current agreement the Company will make available, on an off-shift basis, appropriate physical tests (as deemed by the plant medical director) to employees in welding classifications and employees in classifications that perform oil, quench heat treat operations.

(8.5) Whenever it is determined by Company monitoring or tests that employees have had exposure exceeding the permissible level as set forth in 29 CFR 1910.1000 Air Contaminants, Code of Federal Regulations, such information shall be provided in writing to the Chairman of the Local Union Safety Committee or, in the Peoria area, to the appropriate Plant or Divisional Safety Committeeman. Such information shall also be provided to the Central Committee on Health and Safety.

(8.6) If, as the result of an employee complaint, the Company conducts a test of noise, air contaminants or air flow, the results of such tests shall be explained to

the employee involved and to the Chairman of the Local Union Safety Committee or, in the Peoria area, to the Plant or Divisional Safety Committeeman.

(8.7) In addition to the other provisions of this Article 8, if a condition comes to the attention of the Chairman of a Local Union Safety Committee (or in the Peoria area, the President of Local 974)

- (i) which involves noise, air contaminants or air flow, and
- (ii) which he feels constitutes a health hazard to employees, and
- (iii) about which he has been unable to obtain a satisfactory explanation or response from Company Safety representatives,

such Chairman prior to the filing of a grievance in the Final Step of the grievance procedure may submit a written request to the Central Committee on Health and Safety that such Committee conduct a joint investigation in accordance with item 3 of Letter of Agreement No. 3. If such an investigation is conducted, the Chairman of the Local Union Safety Committee and/or the Local Union President or his designated representative will be allowed to meet with the investigating Central Committee members before and after such investigation in order to explain his complaint and to receive an explanation of the Central Committee's findings.

(8.8) The Company shall be the sole source of safety glasses approved for wear in designated safety glasses areas. Such safety glasses shall be provided by the Company at no cost to the employee subject to the following:

- a. For nonprescription safety glasses, the Company shall furnish the first pair without cost to the employee and such glasses shall remain the property of the Company. Replacement pairs, if necessary, shall be at the employee's expense as provided in (c) below.
- b. For employees requiring them, prescription ground safety glasses shall be provided at no cost to the employee; provided that such safety glasses shall, except as provided in (c) below, be furnished upon receipt by the Company of a revised prescription. However, such replacements due to revised prescriptions will not be furnished more often than once per year. Such glasses shall thereafter be the sole property of the employee. A prescription for ground safety glasses will be accepted by the Company when the prescription is based on an examination made by a qualified eye doctor within the two preceding years, provided that the Company shall in no instance be obligated to pay any part of the cost resulting from a prescription for non-standard frames, special temples, tinted or any other type of special glasses not required by reason of the employee's work at the Company.
- c. When the nature of an employee's work results in damage to either nonprescription or prescription-ground safety glasses to the extent that the company's Safety Supervisor advises replacement, the replacement cost will be borne by the Company.
- d. On either nonprescription or prescription ground safety glasses, if an employee desires pairs of glasses in addition to those provided in (a), (b) or

(c) above, the employee may purchase them from the Company at the Company's cost.

(8.9) When the Company determines that the nature of a job requires the wearing of special protective garments or safety devices, other than safety glasses, the Company will furnish the equipment without cost to the employees and will require the wearing or use of such safety equipment as a condition of employment.

(8.10) When the Company determines that the nature of a job requires the wearing of metatarsal protection, employees shall have an option of wearing auxiliary equipment provided by the Company or of purchasing safety shoes with special metatarsal protection. In the event employees elect to purchase safety shoes with metatarsal protection, and where such purchase is made at a Company-approved source, the Company will contribute the sum of \$13.00 toward the purchase of each pair of such shoes.

(8.11) The Company and the Union recognize the obligation imposed upon the parties to this Agreement by the Occupational Safety and Health Act. When an employee, who has been designated for this purpose as a representative of the employees in the bargaining unit, accompanies an OSHA inspector on an official plant inspection tour at the inspector's request, he shall not lose pay for regularly scheduled hours during such tour. More than one employee may participate as a designated representative but no more than one such designated representative shall act in such capacity at any one time and no more than one such designated representative will be paid for the same hours.

Notwithstanding the previous paragraph, when two OSHA inspectors make simultaneous and separate inspection tours, one designated representative may participate with each OSHA inspector and they shall not lose pay for regularly scheduled hours during such tours.

(8.12) The Company will provide to the Union Central Safety Committee a copy of each facility's report on OSHA Form #200 and the man-hours worked at each such facility during the period covered by such report.

(8.13) (Applicable to Local 974 only)

The privileges which the Chairman of the Safety Committee may exercise are: (1) investigate safety grievances active in the Final Step of the grievance procedure, (2) discuss Final Step safety grievances with Company representatives as provided in the grievance procedure, (3) participate in joint safety investigation agreed to in a Final Step grievance meeting, and (4) consult with Union members of the Central Health and Safety Committee and/or the Regional Director of the International Union or his designate on the disposition of any safety grievance denied in the Final Step of the grievance procedure and/or prepare a statement of all facts and circumstances on a safety grievance that will be forwarded to the UAW-Agricultural Implement Department. If such be the case, such Chairman will exercise only the privileges above set forth or those which otherwise have been mutually agreed upon.

The Chairman of the Safety Committee shall conduct his business from the Local Union office. He shall be considered to be on a leave of absence and will be paid by the Company for his regular shift hours during the regular workweek (excluding Saturdays, Sundays and

holidays) that employees within Local 974 are scheduled to work, provided, however, the Company shall not pay for time spent in (i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union office, or (iv) any activity not directly related to the functions of his office. Any such Chairman who spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay for such. He shall be paid for all such hours at the regular straight-time hourly rate he was receiving just prior to his election (excluding night shift premium) adjusted for general increases and cost-of-living adjustment amounts, if such there be, as provided in Article 18 of this Agreement. He shall be eligible for time off and/or payments in accordance with Articles 9, 10, 15 and 20 of this Agreement, provided such Chairman will not receive payment for the same day under more than one of the provisions of this Central Agreement. For purposes of the Supplemental Agreement relating to Non-Contributory Pension Plan, the Group Insurance Plan attached to the Insurance Plan Agreement, and the Supplemental Unemployment Benefit Plan, such Chairman will have the same coverage as though he as actively at work.

The Chairman of the Peoria Area Safety Committee will be issued a pass upon request to the Labor Relations Department to gain entrance to the plant for the performance of the privileges granted to him as set forth in this Section 8.13.

Such visit shall be limited to the area designated on the pass and must be presented to the Supervisor of the area for which the pass was issued and indicate the employees he wishes to contact. Such pass will be re-

turned to the Labor Relations Department when leaving the plant. Management representatives may accompany the Peoria Area Safety Committee Chairman during such visit.

* * *

ARTICLE 14

Leaves of Absence

(14.1) Leaves of absence shall be granted automatically to employees who, because of physical or mental disability, are unable to work and who provide the Company with proper notice and evidence of such disability.

If the leave of absence is not approved, or, if approved, is later cancelled by the Company, the employee shall be so notified in writing with a copy of such notice given to the Union.

Any dispute arising from this action shall be presented, in writing, directly to the Final Step of the appropriate local grievance procedure and, if applicable, the provisions of Section 5.7 shall be utilized. It is understood that an employee will not be discharged while any such above-described dispute is being processed provided the employee and the Union, within 5 regularly scheduled workdays of receipt of such notice, process such dispute and cooperate in utilizing such procedure.

Notwithstanding the foregoing provisions of this Section 14.1, a disability leave of absence shall be in effect only for the period of the physical or mental disability and in any event the leave shall automatically expire upon completion of a leave period equivalent to the employee's accumulated seniority at the time he became

disabled, or two years, whichever is greater; provided, that if the employee is entitled to receive total disability benefit payments in accordance with paragraph 4.4 of the Group Insurance Plan, his leave shall automatically expire at the end of the last month for which he is entitled to such a payment, if later, and further provided that any successive period of physical or mental disability due to the same or related cause or causes not separated by a period of active full-time work of not less than ten consecutive regularly scheduled days of work during which the employee works all regularly scheduled hours he was scheduled to work (any absence on any such day of work on which the employee would have worked except that he was excused by the Company and compensated for such absence under the provisions of Sections 15.3, 15.4 or 15.5 of this Agreement shall be deemed to be days of work for purposes of this Section 14.1) shall be considered a continuation of the previous period of disability.

Not later than 10 days prior to such automatic expiration, the Company will send a registered letter to the employee's last known address as shown on the Company records reminding him of the fact that his seniority is subject to being broken if he fails to return to work upon expiration of his leave of absence.

(14.2) Upon expiration of a total disability leave of absence, the employee shall either return to work or be separated by the Company as a quit. However, if later reemployed by the Company, the employee who was entitled to receive total disability benefit payments in accordance with paragraph 4.4 of the Group Insurance Plan shall be entitled to his accumulated seniority up to the date of such separation.

(14.3) In accordance with the applicable provisions of Local Agreements, the Company will promptly return to work an employee who is able to return from leave of absence.

(14.4) Employees who fail to return to work upon expiration of a leave of absence shall be separated from the employment of the Company, unless satisfactory reason is given.

(14.5) Except as otherwise herein provided, the granting of other leaves of absence by the Company shall depend (1) upon the reason for the requested leave of absence and (2) upon the need for the employee's uninterrupted services.

(14.6) When a leave of absence is granted by the Company, it shall be verified, in writing, upon request, of the employee.

All leaves of absence shall be without pay, except as expressly provided elsewhere in this Agreement, and seniority shall accumulate during such leaves.

An employee who accepts employment elsewhere, during a leave of absence, without the consent of the Company, shall be deemed to have voluntarily quit.

An employee on disability leave will be advised by the Company of the Company's position regarding employment elsewhere while on such leave. An employee on such leave must advise the Company of any employment elsewhere and he will receive approval for the employment if it is not inconsistent with needed medical treatment.

(14.7) Any employee who, in time of war or national emergency, is drafted or volunteers into the armed forces

of the United States shall be granted a leave of absence, and will be accorded reinstatement rights, as provided by law then in force. Such employee shall also, when date of entry into the armed forces has been determined and established, be entitled to a leave of absence not to exceed the three weeks immediately prior to such entry.

(14.8) Any employee who volunteers and is accepted for service in the Peace Corps shall, upon proper notice to the Company, be granted a leave of absence for a tour of such Peace Corps service. Upon his return from Peace Corps service, he shall be granted the same reinstatement rights as are provided by law then in force in respect to service in the armed forces of the United States.

(14.9) An employee who becomes pregnant will, upon request, be granted a personal leave of absence of reasonable duration under Section 14.5 immediately preceding or following the period of disability associated with the pregnancy or birth if the employee's personal physician, after consultation with the Company's physician, recommends such additional leave as being beneficial for the health or well-being of such employee.

(14.10) Any employee who is elected or appointed to a position with the Union or who is elected or appointed to a temporary national governmental position, or who is elected to a State office, or who is appointed to a temporary position in the Department of Labor or Industrial Commission of his State or the Department of Labor of the United States, shall, upon written request, be granted a leave of absence for the period of such service, provided that no more than the number specified in the appropriate Local Agreement shall be on such leave of absence at any one time.

An employee

- (i) who is elected to a public office in a town, municipality, township, county, or comparable governmental body;
- (ii) who must occasionally take time off from work in order to perform the necessary functions of such office; and
- (iii) who obtains prior approval from the Company to be absent from work; shall be deemed to be on a leave of absence for any such full day of absence (eight consecutive hours) for such purpose.

The Company will grant time off, without pay, to employees for the purpose of attending Union meetings, provided (1) the Company is given advance notice who the employees will be and the date and hour the time off will be taken, such advance notice to be given by the Union not later than noon on the workday preceding such time off, and further provided (2) that not more than the number of employees specified in the appropriate Local Agreement will be granted such time off during any one day. However, in cases of emergency and for the purpose of conducting Union elections time off shall be granted employees upon request of the Union. Time off will also be granted for the purpose of meeting with Company representatives.

Temporary leaves of absence will be granted upon request of the Union for employees who are selected by the Union to attend state, national, or international Union conventions, regional or district Union Conferences.

(14.11) Employees returning from authorized leave or time off for Union business (other than long-term leave

granted to employees elected or appointed to a full-time position with the Local or International Union) will not be required to undergo a return-to-work physical examination before resuming their work in the plant unless during periods of such absences such employees have been ill or injured.

ARTICLE 15

* * *

(15.3) Jury Duty and Witness Service

Any full-time employee who has more than 30 days of seniority and/or group seniority (if applicable) who either

- (i) is summoned and reports for jury duty in a Court of Record or Grand Jury, or
- (ii) is required by applicable law to appear for examination by a jury commission prior to such jury service, or
- (iii) is subpoenaed and reports for witness service in a Court of Record or Grand Jury

will be reimbursed by the Company, for each day on which he would otherwise have been scheduled to work, in accordance with the succeeding provisions of this Section 15.3.

- a. If he is absent for his entire shift because of such jury duty or witness service, he will be paid the difference between his jury duty pay or witness fees received and eight hours pay at his straight-time hourly rate.
- b. If he performs such jury duty, witness service, or examination by a jury commission and work on the

same day, he will be paid the difference, if any, between his actual earnings for that day plus the jury pay or witness fee received and eight hours pay at his straight-time hourly rate.

- c. Reimbursement under (iii) above will not be payable if the witness service is related to a matter in behalf of or as a result of his association with another employer or association.

Reimbursement to any employee under this Section 15.3 shall be payable only if the employee gives the Company prior notice of his summons or subpoena for jury duty, jury commission examination or witness service, and presents satisfactory evidence that jury duty, examination by a jury commission or witness service was performed on the day or days for which such reimbursement is claimed, and returns to work promptly on any day on which his jury duty, examination by a jury commission or witness service totals less than four hours and does not prevent him from completing on that day, at least two hours of his regular shift, provided that any employee who serves on a jury and works on the same day will not be required to work more than four hours of his regular shift and further provided, with respect to an eligible employee who is assigned to the third shift, that only in the case of jury duty or witness service performed, the necessity for returning to or reporting for work as set forth above shall not be applicable either to the regular shift preceding, if any, or the regular shift following, if any, the day on which such summons or subpoena ordered him to report and he did report, but such exemption shall not include both days.

Within the Commonwealth of Pennsylvania only, the Magistrate Court shall be deemed to be a "Court of Record".

(15.4) Temporary Military Service

Each employee while actively employed in a bargaining unit covered by this Agreement (but not while on layoff) who is absent because of required performance by him of

- a. temporary active duty for training as a Reservist or National Guardsman (not to exceed in any fiscal year - October 1 of one year to October 1 of the year following either 14 consecutive calendar days or 10 regularly scheduled workdays, if training is not performed on consecutive calendar days), or

- b. temporary emergency duty as National Guardsman

will be reimbursed for each day of such absence which he (i) possesses one or more years of seniority in such bargaining unit and (ii) would otherwise been scheduled to work (excluding, however, Saturdays and Sundays or in the case of seven day operations, the sixth and seventh days of his scheduled workweek) up to a maximum of thirty days during any one fiscal year, in accordance with the succeeding provisions of this Section 15.4.

If he is absent for his entire shift because of such duty, he will be paid the difference between his gross military pay (including longevity pay and extra risk bonuses but excluding quarters, subsistence, travel or similar allowances) and his daily straight-time pay for his regular shift. If he performs such duty and works on the same day, he will be paid the difference, if any, between his actual earnings for that day plus the military pay received and his daily straight-time pay.

Reimbursement to an employee under this Section 15.4 shall be payable only if the employee gives the Company prior notice of his call to such duty, and submits to his Supervisor a "Military Pay Statement" form furnished by the Company, fully completed by the employee and his Commanding Officer (or other commissioned officer authorized to approve military pay vouchers) and when released or excused from such duty returns to work promptly.

(15.5) Bereavement

When death of an employee's brother, brother of a current spouse, sister, sister of a current spouse, spouse, parent, parent of a current spouse (including stepparent and adoption parent), child, adopted child, stepchild, grandchild, stepfather, stepmother, adoption father, adoption mother, occurs, the employee, on request, will be excused for up to three consecutive nominal scheduled days of work (or for such fewer days as the employee may be absent) during the four days (excluding (a) Saturdays and Sundays or in the case of seven-day operations, the sixth and seventh days of the employee's scheduled work week, and (b) holidays specified in Section 7.8) beginning with the date of death provided he attends the funeral. The employee shall receive eight hours pay for each scheduled day of work for which he is so excused (excluding (a) Saturdays and Sundays or in the case of seven-day operations, the sixth and seventh days of the employee's scheduled work week and (b) holidays specified in Section 7.8), provided he attends the funeral. Payment shall be made at the employee's straight-time hourly rate on the last day worked.

When death of an employee's grandparent, half brother, half sister, stepbrother, stepsister, or current spouse of a child (including adopted child and stepchild) occurs, an employee, on request, will be excused for any normal scheduled hours of work (or for such fewer hours as the employee may be absent) during the day of the funeral provided he attends the funeral. The employee shall receive up to eight hours pay for scheduled hours of work for which he is excused on the day of the funeral provided he attends the funeral. Payment shall be made at the employee's straight-time hourly rate on the last day worked.

In the event a member of the employee's immediate family as above defined dies, the employee may, should the funeral be delayed, have his excused absence from work as above provided delayed to include the date of the funeral.

In the event the body of a member of the employee's immediate family as above defined has been physically destroyed or the body is donated to an accredited North American hospital or medical center for research purposes, the requirement that the employee attend the funeral may be satisfied by attendance at a memorial service.

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[EXCERPTS FROM THE LOCAL AGREEMENT]

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ARTICLE 2
REPRESENTATION

(2.1) The Company recognizes and will deal with those representatives of the Union as set forth in this Section 2.1 and Article 4, Section 4.1(D) of the Central Agreement for the purposes of resolving grievances.

A Steward elected from among the employees under the supervision of each Foreman on each shift. Such election may be held on Company property but not on Company time.

The functions and privileges of such representatives shall be:

- a. Plant Committeemen and Stewards will function as set forth in Section 2.2 of this Article 2 with privileges accorded therein.
- b. The Alternate Committeeman (1) shall act as the Chairman of the Grievance Committee in his absence, (2) may act in the place of an absent Plant Committeeman, and (3) if not acting as in (1) or (2) above will assist the Chairman in conducting his business at the Local Union Office. He shall attend Third Step Meetings only when substituting as in (1) or (2) above, Third Step pre-meeting discussion and if designated by the Chairman, Fourth Step Review meetings. Such Alternate Committeeman shall be full time and paid by the Company in the same manner provided for the Chairman in Article 4, Section 4.6, Paragraph 3 of the Central Labor Agreement.

- c. The Chairman of the Grievance Committee shall function in accordance with Section 4.6 of the Central Agreement.

(2.2) In taking Step 1, Stewards may, without loss in pay for regularly scheduled hours, discuss a grievance with the aggrieved employee (provided the aggrieved employee first informs his immediate Supervisor of his desire for such discussion), with the employee's immediate Supervisor and, if the grievance is not satisfactorily settled in Step 1, with the Plant Grievance Committeeman who would handle the grievance in Step 2. In the temporary absence of a Steward, an alternate may be temporarily appointed by the Chairman of the Plant Grievance Committee or his authorized representative.

In taking Step 2, a Plant Grievance Committeeman may discuss the grievance as provided in Step 2 of the grievance procedure without loss in pay for regularly scheduled hours, with the aggrieved employee, with the Steward who handled the grievance in the first step, and with the Superintendent or other Company-designated representative.

In taking Step 3, members of the Plant Grievance Committee may discuss the grievance as provided in Step 3 of the grievance procedure without loss in pay for regularly scheduled hours.

In taking Step 4, members of the Union Review Committee may discuss the grievance as provided in Step 4 of the grievance procedure without loss in pay for regularly scheduled hours.

ARTICLE 3 GRIEVANCE PROCEDURE

(3.1) When grievances arise, an earnest effort will be made to settle them as follows:

STEP 1. The aggrieved employee shall present his grievance either personally or with his Steward directly to his Foreman who shall render a decision within two working days.

STEP 2. If the grievance is not satisfactorily adjusted by the Foreman, a Plant Grievance Committeeman should take the grievance to the Superintendent or other Company-designated representative, who will, as promptly as possible, arrange a meeting for discussion of the grievance. In taking the second step of the grievance procedure, members of the Plant Grievance Committee shall represent employees geographically located in their general areas as defined in Section 4.1, D of the Central Agreement.

STEP 3. If the grievance is not satisfactorily adjusted by the Superintendent or other Company-designated representative within three working days after date of meeting, the Plant Grievance Committee should then present the grievance in writing to the Labor Relations Manager (or his authorized representative) for discussion at their next weekly meeting. Such meetings will be held every Tuesday at 1:30 P.M. provided there are grievances to be considered. Representatives of the Employee Relations Department may also be present at these meetings. The Labor Relations Manager shall forward the grievance to the appropriate department manager (or his authorized representative), who shall render his decision no later than the next regular meeting.

The Plant Grievance Committee shall have an opportunity to assemble in the conference room one and one-half (1.5) hours prior to Step 3 meetings.

To be considered at a Third Step meeting of the grievance procedure, grievances shall be submitted to the Labor Relations Manager (or his authorized representative) no later than 1:30 P.M. the Wednesday prior to that meeting.

The Company shall prepare minutes of each Third Step grievance meeting between Company representatives and the Plant Grievance Committee. Three copies of such minutes shall be promptly supplied the Union. If there is no objection raised at the succeeding meeting between the parties, the minutes shall be initialed by the parties and shall stand of record. Such minutes shall include:

- a. Date of meeting.
- b. Names of those present.
- c. Statement of each grievance taken up and discussed; also a summary of the Union's contention in the event of failure to adjust.
- d. Management's answers to each grievance, along with reasons, if grievance is denied.

STEP 4. If the grievance is not satisfactorily adjusted by the Department Manager (or his authorized representative), either party may request that the decision be reviewed. Request for a review meeting must be made within twenty working days after the Company has given the Union minutes of the Third Step meeting. The review meeting shall be held within five working days of the time the request is made for such meeting. The Union may be represented by the International Repre-

sentative, the Local Union President, the Grievance Committee Chairman, and a third member of the Union Review Committee at the option of, and designated by the Chairman. The Company may be represented by not more than four representatives, one of whom shall be the Labor Relations Manager (or his authorized representative). The Company shall render its decision in writing no later than five working days after said meeting.

Representatives of the Union Review Committee specified above shall have an opportunity to assemble in the conference room one-half hour prior to Step 4 review meetings.

(3.2) To be processed under the above grievance procedure, a grievance must be presented within fifteen working days of the time the grievance occurred or within fifteen working days of the time the employee or Union first became aware of the grievance.

(3.3) Any grievance not appealed from a decision in Steps 1 and 2 within ten working days of such decision shall be considered settled on the basis of the last decision and not subject to further appeal.

LETTER FROM CATERPILLAR
TO UAW
[Oct. 30, 1992]

[Caterpillar Letterhead]

October 30, 1992

Mr. Elliott Anderson
Administrative Assistant
Agricultural Implement Department
United Auto Workers
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Andy:

Since the UAW unilaterally terminated the Central Agreement and Local Supplements on November 4, 1991, the Company has been under no obligation to continue to compensate or provide coverage (at no cost) under the Group Insurance Plan for the various chairmen of grievance committee or full-time grievance committeemen who are treated as though they were on either a full-time or part-time leave of absence from the Company under Article 4 of the terminated Agreement.

Despite the lack of any legal obligation to subsidize the UAW, Caterpillar has continued to do so on a voluntary basis in the hope that such forbearance would be conducive to good faith negotiations. However, to date no agreement has been reached. Instead, the UAW and its representatives have wasted time and energy in a campaign to ostracize and harass our employees who chose to exercise their statutory rights to return to work. In addition, many of these leaders have repeatedly, but unsuccessfully, tried to influence customers not to buy

our products. They have attempted to reduce the productivity and efficiency of Caterpillar's manufacturing operations. They've questioned Caterpillar's reputation for quality products—an action that could risk the livelihood of all Caterpillar employees.

We estimate that full-time Union committeemen and chairmen reap a windfall of over \$1.8 million per year in wages and benefits from Caterpillar (including an automatic six hours of "overtime" pay each week). Although the UAW's efforts to harm Caterpillar and our workers have proven unsuccessful, we see no reason to continue to subsidize such unprotected conduct. Indeed, one may even question the legality of such payments. Therefore, effective November 16, 1992, and continuing until a new agreement is reached Caterpillar no longer intends to subsidize the UAW by paying wages to or by providing coverage at no cost under the Group Insurance Plan for the Union's various chairmen of grievance committees, full-time grievance committeemen or their replacements in the absence of a labor agreement between the parties legally providing for such payments and coverage. Instead, such compensation and benefits will be the responsibility of the UAW.

Obviously, this letter does not apply to those UAW representatives who continue to administer the grievance procedure under the current CLS Agreement. Moreover, stewards and part-time committeemen employed by the Company who are responsible for processing grievances for our employees on an as-needed basis during the workday, will continue to be paid by the Company without any docking of pay for time properly spent in grievance administration.

UAW representatives who are covered by this letter are listed on the attached list. We will, of course, continue to recognize these individuals as UAW representatives with rights and privileges as detailed in Sections 4.6, 4.7, and 4.8 of the Central Agreement and in the appropriate sections of the various Local Agreements.

If you have any questions or wish to discuss this matter further, please contact the undersigned.

Sincerely,

/s/ J.L. Brust
Director
Corporate Labor Relations

[Attachment to Letter]

<u>Name</u>	<u>SSN</u>	<u>Badge</u>	<u>Location</u>
Ted E. Johnson	310-38-2490	44268	Hauling Units & Motor Graders (Decatur)
Terry L. Orndorff	173-32-7110	42449	Precision Barstock Products (York)
Edward H. Benedict	185-34-8258	42232	" " "
William E. Jones	289-34-9875	46961	Engine Systems (Pontiac)
Albert J. Weygand	329-40-3463	1080	Wheel Loaders & Excavators (Aurora)
Lorin J. Lippert	322-38-5524	36872	Technical Services Division (Technical Center)
Ricky L. DeGroot	333-48-0684	5985	" " " "
Otha Boyd	428-92-2401	52211	Chemical Products (Mossville)

<u>Name</u>	<u>SSN</u>	<u>Badge</u>	<u>Location</u>
Suell I. Noye	339-44-5698	56116	Medium & Small Engine Products (Mossville)
Jerry L. Oliver	342-36-6575	53334	" " " " "
Richard G. Bennett	322-38-5870	53375	" " " " "
John P. Bridgewater	325-46-5585	12332	" " " " "
Michael P. McIntyre	342-36-5671	58676	" " " " "
Kevin P. Hollaway	346-46-5064	4516	" " " " "
Don A. Brown	352-34-8978	53315	Foundry (Mapleton)
Semaan A. Trad	325-50-5873	58646	" "

52

John W. Harris	322-38-8311	52784	Track Type Tractor (East Peoria)
Gerald D. Smith	357-36-9042	36129	" " " " "
Harry R. McEuen	345-32-6283	52225	" " " " "
Harold R. Snider	333-40-7111	11040	" " " " "
David C. Johnston	357-40-4633	33603	" " " " "
James D. Glover	359-34-9779	32115	" " " " "
Tommie R. Dabbs	337-36-2920	51868	" " " " "

<u>Name</u>	<u>SSN</u>	<u>Badge</u>	<u>Location</u>
Mark F. McNamara	321-48-5681	14777	" " " " "
John W. Bainbridge	319-44-9978	17494	" " " " "
Danny R. Miller	321-48-7116	8417	" " " " "
James T. Clingan	318-42-1648	17469	Transmissions (East Peoria)
Emery G. Tabor	333-40-7296	57998	" " " "
Ronald J. Logue	327-36-7002	51593	Services Unit (Peoria Area)
*Joseph T. Vasquez	522-56-3022	28304	Parts & Service Support (Denver)

53

*Only discontinuation of eight-hours pay per week for conducting Union business during regularly scheduled hours; does not affect status under Group Insurance Plan.

AFFIDAVIT OF TERRY ORNDORFF

[May 3, 1993]

Terry Orndorff, being first duly sworn on oath, deposes and states:

1. That he has been employed by Caterpillar Inc. in York Pennsylvania since April 1969, most recently in the drill specialist classification. That since May 1990, he has been Chairman of the Grievance Committee for Local Union 786, and, as such, has personal knowledge of the facts set forth herein.

2. That Article IV and Secs. 14.6-14.10 of the most recent Central collective bargaining Agreement between Caterpillar Inc. and the UAW is attached hereto as Exhibit I (hereafter "Central Agreement"). That Article IV sets forth the provisions for Union Representation in conjunction with the processing and settlement of grievances, including but not limited to provisions regarding the Chairman of the Grievance Committee and the Alternate Committeeman. That Secs. 14.6-14.10 contain provisions on unpaid leaves of absence for military duty, Peace Corps service, certain government offices and union office (not including Chairman of the Grievance Committee, which is covered by Sec. 4.6).

3. That, the duties of the Chairman are set forth in Sec. 4.6 of the Central Agreement (Exh. I) and relate primarily to grievance matters at Caterpillar York.

4. That under the terms of Sec. 4.6 of the Central Agreement, the Chairman is nominally considered to be on "leave of absence" from Caterpillar; however, this is not an unpaid leave of absence and he is to be paid by Caterpillar (at the drill specialist's rate) for the regular

shift hours of Caterpillar employees in his jurisdiction, except as specifically provided in Sec. 4.6.

5. That under Sec. 4.6, the Chairman is not to be paid by the Company for time spent in (i) negotiations, (ii) vacation, (iii) attendance at meetings and/or conventions not held in the Local Union office, or (iv) any activity not directly related to the functions of his office as Chairman of the Grievance Committee.

6. That until Caterpillar unilaterally discontinued paying the Chairman in November 1992, the Chairman's regular practice at the York Caterpillar facility was to complete a time card (an example of which is attached hereto as Exh. II) and turn it into the Caterpillar Labor Relations Office each week. The card was then reviewed by Harold Booze (Caterpillar Human Resource Manager), and/or Larry Staker (Caterpillar Labor Relations Manager), who signed off on the card so it could be processed for payment by the Caterpillar payroll office. The time card shows the number of hours worked each day of the week on activities for which Caterpillar is obligated to pay under Sec. 4.6 of the Central Agreement, as well as a designation of the time spent, if any, on such things as vacation, personal days off, and activities for which Caterpillar is not obligated to pay pursuant to Sec. 4.6 of the Central Agreement.

7. That, pursuant to regular practice at the York Caterpillar facility, whenever the Chairman was involved in activities for which Caterpillar was not obliged to pay pursuant to Sec. 4.6 of the Central Agreement, the Union would complete and send to Caterpillar a "call out" form, a copy of which is attached as Exh. III. This form would inform Caterpillar that it should not pay the Chairperson for the hours indicated on the call-out form.

8. That he has reviewed Plaintiff's First Request (to Local 786) for Production of Documents, as well as the document requests made in conjunction with Plaintiff's Notice of Depositions of Local 786 officials. That, if all the requested documents were to be produced, it is estimated that thousands and thousands of pieces of paper would be produced and thousands more would have to be reviewed in order to weed out the unresponsive ones. Because these documents are in files all over the Union office, many of which are not ordinarily kept in the course of business in a manner corresponding to the categories in which plaintiff seeks discovery, a large portion of the Union's files would have to be reviewed in order to find responsive documents.

Further, affiant sayeth not.

[Jurat Omitted in Printing]

[Exhibits Omitted by Designation]

DECLARATION OF PAT GREATHOUSE

[October 13, 1995]

[Caption Omitted in Printing]

I, **Duane Patrick "Pat" Greathouse**, state my declaration as follows:

1. I live at 44450 Harmony Lane, Belleville, Michigan 48111. I make this declaration of my own personal knowledge and I am competent to testify to the matters stated herein.

2. I am a charter member of UAW Local 551, which represents workers in the Ford Assembly Plant in Chicago, Illinois. I became a UAW member in 1941.

3. I was elected by the UAW membership as a full time committeeman under the first contract between the UAW and Ford, dated June 20, 1941. As far as I am aware, the provision in the 1941 Ford-UAW collective bargaining agreement for a full-time committeeman was the first time the UAW negotiated a provision for a full-time committeeman in any of its collective bargaining agreements with employers. In that position, I was no longer assigned duties on the plant floor; instead, I worked full-time on duties relating to administration of the grievance procedure.

4. In February 1943, I became employed as an International Representative of the UAW, assigned to UAW Region 4.

5. In 1947, I was elected to the UAW's International Executive Board as Director of UAW Region 4 (which covered northern Illinois, Iowa, Wisconsin, Minnesota, North and South Dakota, Wyoming and Montana).

6. In January 1956, I was elected to be a Vice President of the UAW and was assigned by UAW President Walter Reuther to be Director of the UAW's Agricultural Implement Department ("Ag-Imp" Department).

7. I headed negotiations for the UAW in the Ag-Imp Department until my retirement from the UAW in June 1980. The Ag-Imp Department negotiates with UAW-represented companies which manufacture farm implements, earth-moving equipment, trucks and other heavy equipment. This includes employers such as Caterpillar, John Deere, International Harvester (now Navistar), and J. I. Case.

8. The first negotiated agreement between the UAW and Caterpillar providing for a full-time Chairman of the Grievance Committee to be paid by Caterpillar was the agreement effective in November 1973. (Exh. A). This followed a similar provision which had been negotiated by the UAW with Deere and Company. (A copy of the Deere/UAW Agreement effective February 1971 is attached as Exh. B).

9. Prior to these parties negotiating the "full-time" Grievance Chairman position, the collective bargaining agreements contained provisions specifically authorizing union representatives such as stewards, chief stewards, committeemen, etc. to leave their plant floor jobs—without loss of pay—to handle grievance-related matters. Prior to 1973, most of the details of this type of representation at Caterpillar were set forth in local supplements to the Central UAW/Caterpillar agreement. (See for example, the 1970-1973 Caterpillar of York/UAW Local 786 Agreement, Article 2, attached as Exh. C and the representation provisions of the 1970-1973 Supplement for Local 974 covering the Caterpillar Plants at Morton,

Mapleton, Mossville and East Peoria, Illinois, attached as Exh. D).

10. In most of the UAW/Caterpillar agreements (as in the UAW's agreements with many large employers), the parties provide for a hierarchy of sorts for grievance handling—stewards handle the first steps of a grievance, committeemen handle higher steps while the Chairman of the Grievance Committee, the highest locally based representative, handles yet higher steps.

11. Although the procedures vary from plant to plant, basically what happens when a worker wants to see his or her union representative or when there is a scheduled grievance meeting is that the union representative's foreman is notified of the need to have the representative leave his job. Depending on what type of plant job the union representative has, a relief person may have to be arranged to fill in while the union representative is functioning in his representative capacity. Thus, for example, if the union representative's regular job is on an assembly line or on a continuous machinery line or is on a heavily burdened singular machine, the worker can not leave without being relieved. Depending on whether the worker with the problem works in the same or different area as the union representative, the representative may have to get a pass and special permission to enter the worker's area. When the union representative is finished with his work, he will generally return to his regular plant job—after notifying the appropriate people. If the union representative has been relieved during his absence, the reliefman will go elsewhere.

12. In the large plants (like those at Caterpillar), as the work and the collective bargaining agreements became ever more complicated, the Chairman of the Griev-

ance Committee was often very busy with grievance handling work and often had to leave his regular plant job to do that work. In practice, Grievance Chairmen often were spending full time doing their grievance-related work with little or no time left for their regular plant jobs.

13. In 1973, Caterpillar and the UAW agreed that Caterpillar would pay the Chairman of the Grievance Committee "full time" for doing the work outlined under Section 4.6 of the Agreement (Exhibit A).

14. As I recall the negotiations at both Deere and Caterpillar which led to the creation of the Grievance Chairman position on a "full time" basis, the parties agreed that it was less disruptive to production to establish the Grievance Chairman position on a full-time basis than to continue to have the Chairmen, in order to handle grievances and other similar matters, repeatedly pulled off and on the job.

15. It was the Company's idea to have the Chairman based at the Local Union office. The UAW preferred that the full-time Grievance Chairman be based in the plant, as the full-time Chairmen are in the automobile plants represented by the UAW. Caterpillar, however, thought it less disruptive to production if the Chairman worked out of the Local Union office, and that is what the parties agreed to in Article 4.6. Among other things I recall Caterpillar bringing up at the time is that it would be less disruptive to structure things so the workers would go to the Local Union Hall to see the Grievance Chairman—usually before or after the workers' regular shifts, than to have the workers meeting with the Chairman at the plant.

16. At Caterpillar, when we first negotiated the full-time Chairman provision in 1973, we agreed that any such full-time Chairman would be paid by Caterpillar for regular shift hours during the regular workweek (excluding Saturdays, Sundays, and Holidays). This had the effect of canceling the Chairman's right to get overtime. So, the parties negotiated a provision that Caterpillar would, under the circumstances outlined in the collective bargaining agreement, pay the full-time chairman an additional six (6) hours of pay in a workweek at straight time rates. This was equivalent to four (4) hours of overtime at time and one-half pay, the regular overtime rate.

17. Over the years, I have heard numerous times from full-time Chairman that if they were working on the plant floor they would have had opportunity for more than four (4) hours of weekly overtime pay. Committeemen who are in the plant and paid by Caterpillar on a "part time" basis for their committeemen work share in both daily and the weekend overtime. Many Committeemen, therefore, earn more than the full-time plant Chairman even with his additional six (6) hours' pay.

18. When we negotiated the full time Chairman provision in 1973, we included the language the "The Chairman of the Grievance Committee shall . . . be considered to be on a leave of absence . . ." This language, like most of the language in Article 4.6 on the "full time" Chairman, has not been changed since 1973. Basically, the purpose of this language was to recognize that while in the full-time Chairman position, an employee would not be assigned to his regular plant job—in effect, he would be considered to be on a leave of absence from that regular plant job. He was not, however, in any sense on "leave of absence" from Caterpillar.

19. Another reason we agreed to use the words "considered to be on a leave of absence" was that if the employee in the full-time Chairman position remained assigned to his regular plant job, he would automatically be eligible for any overtime work and pay that existed for his job classification; this, however, would have been inconsistent with the parties' agreement that employees in the full-time Chairman position were not to be eligible for plant overtime. By "considering" him "to be on a leave of absence," he was taken off of the overtime eligibility list.

20. With regard to various benefit plans applicable to bargaining unit employees in 1973, we provided in Art. 4.6 that the "Chairman would have the same coverage as though he was actively at work." This language was to assure that the Chairman received the same benefits he would receive if assigned to his regular plant job.

21. The duties of the Chairman of the Grievance Committee include dealing with employee problems as they pertain to relationships with the Company, investigating grievances, and seeing that grievances are properly handled, expedited and resolved as soon as possible. The Chairman's job is to make sure the contract works; he is like a contract administrator. In this, he works together with Company labor relations officials and helps coordinate or in effect administer the Agreement. If the Agreement works, everyone benefits—the workers, the Company and its production needs, and the Union.

[Jurat Omitted in Printing]

[Exhibits Omitted by Designation]

AFFIDAVIT OF GERALD LAZAROWITZ

[October 17, 1995]

[Caption Omitted in Printing]

Being first duly sworn, Gerald Lazarowitz, says and deposes as follows:

1. My name is Gerald Lazarowitz. My office address is 8000 East Jefferson Ave., Detroit, Michigan 48214-2699. I make this affidavit based on business records under my control.

2. Since 1991, I have been the Director of the Research Department of the International Union, UAW. In that capacity, I supervise our historical collection of labor agreements, covering various UAW-represented bargaining units. This is the same collection made available for inspection by attorneys from Caterpillar on October 2, 1995.

3. In the automobile, agricultural implement, and related industries, the better UAW-bargained labor agreements have, for some time, contained language providing for full-time, employer-paid UAW representatives.

4. For instance, such language is contained in the contracts with Ford, General Motors, Chrysler, Deere & Co., and J.I. Case. In Ford and General Motors, the provision dates to 1941. In Chrysler, it dates to the 1943-45 contract. In J.I. Case, an agricultural implement employer, it dates to 1977.

5. Attached hereto, and incorporated by this reference as the Exhibit indicated below, are the relevant provisions from those labor agreements, both past and present:

- Exhibit #1 Ford-UAW, 1941-42
- Exhibit #2 Ford-UAW, 1993-96
- Exhibit #3 GM-UAW, 1941
- Exhibit #4 GM-UAW, 1993-96
- Exhibit #5 Chrysler-UAW, 1943-45
- Exhibit #6 Chrysler-UAW, 1993-96
- Exhibit #7 J.I. Case-UAW, 1977-80 (Local 180)
- Exhibit #8 J.I. Case-UAW, 1980-83 (Local 180)
- Exhibit #9 J.I. Case-UAW, 1995-98 (Local 180)
- Exhibit #10 Deere & Co.-UAW, 1995-97

Further affiant sayeth not.

[Jurat Omitted in Printing]

[Exhibits Omitted by Designation]

SECOND AFFIDAVIT OF TERRY LEE ORNDORFF

[October 18, 1995]

[Caption Omitted in Printing]

Terry Lee Orndorff, being first duly sworn on oath, deposes and states:

This is the second Affidavit I have made in this case. I am the Chairman of the Grievance Committee for UAW Local Union 786 and, as such, have, personal knowledge of the facts set forth herein.

1. I have reviewed my pay stubs from the weekly paychecks I received from Caterpillar between the pay period ending May 13, 1990 (immediately before I became Chairman of the Grievance Committee on May 20, 1990) and the pay period ending November 15, 1992. A sample of the pay stubs is attached to this Affidavit as follows:

- Exh. A-1: Pay period Ending 5-13-90
- A-2: Pay period ending 5-27-90
- A-3: Pay period ending 4-21-91
- A-4: Pay period ending 6-02-91
- A-5: Pay period ending 10-06-91
- A-6: Pay period ending 12-08-91
reflecting payment of vacation
pay and vacation bonus,
pursuant to Articles 9 and 10
of the 1988 Central Agreement
- A-7: Pay period ending 12-15-91

2. From my review of my pay stubs from Caterpillar, I note that in each pay period between those dates in which I received the additional six (6) hours of straight time pay provided for in Section 4.6 of the Central Agreement between those dates the extra 6 hours showed up on my pay stub as follows: four (4) hours was added to the number of hours of regular pay which I actually reported to Caterpillar for the week; and two (2) hours was recorded on a line titled "overtime p", but actually paid at my straight time rate. The extra six (6) hours was recorded this way regardless of whether I reported forty (40) hours to Caterpillar for the week or fewer hours. Compare for example, Exhs. A-7 with A-5.

3. In order to prepare to handle my grievance handling responsibilities as effectively as possible, I have developed a listing of grievances which have been processed to the Step 3 of the Grievance Procedure under the Central Agreement and the York Supplement, Article 3. This list includes the grievance number, the name of the grievant(s), the date grievance was filed, the committeeman's name and a short statement of what the grievance is about. I maintain the list both to assist me in my investigating and presenting Step 3 grievances, and also

to help me advise and counsel the stewards and committeemen as they handle their grievance responsibilities at Step 1 and 2 of the grievance procedure. Some of the grievances are relatively uncomplicated and some are very complicated and take a great deal of effort and time to handle. According to my lists, the following number of grievance cases were processed to Step 3 of the Grievance procedure in York during each year indicated:

1987—63
 1988—52
 1989—61
 1990—90
 1991—79
 1992—140

Although grievances have been filed since 1992, I have not included them in this Affidavit.

4. Pursuant to Section 11.5 of the 1988 Central Agreement, Caterpillar is to send the local union a Union Seniority List on a quarterly basis. Excerpts from the Quarterly Union Seniority list dated July 28, 1992 are attached as Exhibit B. On this list, Status Code "1" designates "active", Code 2 is "temporary," Code 6 is "medical leave", Code 12 is "Workers Comp", Code 13 is "Long-Term Disability," and Code 14 is "Layoff." On July 28, 1992, I was Chairman of the Grievance Committee and appear on this list in Status Code "1" "active." Edward Benedict who was Alternate Committeeman at the time also appears on this list in "active" status (Code 1).

Further, affiant sayeth not.

[Jurat Omitted in Printing]

[Exhibits Omitted by Designation]

DECLARATION OF TERRY LEE ORNDORFF

[November 1, 1995]

[Caption Omitted in Printing]

I, Terry Lee Orndorff, state my declaration as follows:

1. I live at RD 3, Box 406E, Hanover, Pennsylvania. I make this declaration of my own personal knowledge and I am competent to testify to the matters stated herein.

2. Among the documents produced to plaintiff Caterpillar in this matter in September 1995 were copies of certain "call-out" slips still in the possession of Local Union 786. The "call out" slips are the slips that the Local 786 president would use to notify Caterpillar that a Caterpillar employee needed to be "called out" for union business (under Art. 14.10, 3rd para. of the 1988 Central Agreement). Caterpillar did not and does not pay employees for time during which they were out of the Plant on "call out". The "call out" system was also used at York for convenience to "call out" the Chairman of the Grievance Committee and the Alternate Committeeman. Copies of most of the "call out" slips for the past several years have been kept in the Local 786 office. During the period Jay Roberts was President (until March 1993), he often—but not always—would make a contemporaneous handwritten note on the Union's copy of the "call out" slip indicating the nature of the Union business that necessitated the "call out". Two examples of "call out" slips with handwritten notes are attached as Exhibit C to this Third Affidavit.

3. I have reviewed the "call-out" slips and the handwritten reasons for the "call outs" between May 20, 1990 when I became Chairman of the Grievance Committee ("Chairman") through November 15, 1992, the last day Caterpillar paid the Chairman and the Alternate Committeeman under Sec. 4.6. Based on these documents, I have prepared and attached as Exhibit D, a list of the dates and hours I was "called out" during this period, along with the reason which appears (in handwriting) on the "call out" slip. If the "call out" slip does not contain a handwritten explanation for the "call out", I have left blank the column labeled "reason." Because the Local union may not have a copy of every single "call out" slip for the period, the list of "call out" times and hours may not be 100% accurate; but I am comfortable it gives a very close approximation of the times I was "called out" from Caterpillar during this period.

4. An explanation of some of the terms on Exhibit D, under the column labelled "Reason" follows:

"Ag Imp" - means attendance at meeting of the UAW locals which represent employers in the UAW Agricultural Implement ("Ag Imp") Department (e.g., Caterpillar, J.I. Case, John Deere, etc.).

"Cat Council" - means attendance at meetings of the UAW locals which represent employees within the Caterpillar chain.

"Central Committee Meeting" - means meeting of the members of UAW's Central Bargaining Team for bargaining with Caterpillar.

"HRC" means Pennsylvania Human Relations Commission.

"U/E" means Unemployment insurance hearing.

"W.C." means Workers compensation hearing.

5. I have a copy of the payroll stubs which I received from Caterpillar with each regular paycheck between May 27, 1990 and November 15, 1992. Examples of these payroll stubs were attached as Exhs. A-1 through A-7 to the Second Affidavit of Terry Lee Orndorff filed in this matter. From the payroll stubs, I have prepared a list of the number of hours of pay I received from Caterpillar each pay period during this period. This list is attached as Exhibit E. I have noted under the Column labelled "Comments" each instance when the payroll stub reflected pay other than Regular pay and Overtime pay.

6. The meaning of the various types of pay listed under the "Comments" column is as follows:

"Absence Pay" means the pay for Paid Absence Allowance under Sec. 15.1 of the 1988 Central Agreement. This is an allowance available to certain employees "while actively employed in a bargaining unit" providing pay for up to 50 hours per year of absences for reasons set forth in Sec. 15.1-D of the 1988 Central Agreement. The reasons include such things as absence due to accident, illness, extreme weather conditions, etc. The use of Paid Absence Allowance under Sec. 15.1-D is not available for "any period of absence on Union business".

"Attendance Bonus Hours" means pay for the hours earned under Sec. 15.6 of the 1988 Central Agreement for which employees "actively employed in the bargaining unit" are eligible if they meet the conditions set forth in Sec. 15.6. Pay for Attendance Bonus Hours, if any, occurs, pursuant to Sec. 15.6-C "imme-

diately before the second vacation period each year." Thus, the Attendance Bonus payment usually occurs in early December; it is reflected in Exhibit E on my pay stubs for December 9, 1990 and December 8, 1991.

[Jurat Omitted in Printing]

[Exhibits other than Exhibits D and E Omitted by Designation]

[Exhibit D]

CALL-OUTS - TERRY ORNDORFF

Date	Hours	Reason
<u>1990</u>		
5/14	7:24 - 3:24	Transition
5/17 - 5/18	7:24 - 3:24	Hall
5/30 - 6/1	7:24 - 3:24	Ag. Imp.
6/7 - 6/8	7:00 - 3:00	Civil Rights
6/19 - 6/22	7:00 - 3:00	Cat. Council
7/30, 7/31, 8/1-8/3	7:00 - 3:00	Summer School
8/7	7:24 - 3:24	Peoria Outsourcing
8/13 - 8/16	7:00 - 3:00	Skill Trades Conference
9/18 - 9/21	7:00 - 3:00	Cat. Council
10/30 - 10/31	7:00 - 3:00	Ag. Imp.
11/1 - 11/2	7:00 - 3:00	Ag. Imp.
<u>1991</u>		
2/18 - 2/22	7:00 - 3:00	Leadership Conference
3/18 - 3/22	7:24 - 3:24	Ag. Imp. & Cat. Council
5/8	7:24 - 9:24	HRC Rose Showers
5/28 - 5/31	7:24 - 3:24	Cat. Council
6/10 - 6/14	Entire Shift	
6/26 - 6/27	7:00 - 3:00	Ag. Council & Committee Mtg.
7/11	7:24 - Until	Organizing
7/30 - 8/1	7:00 - 3:00	Central Negotiations
8/5	8:00 - Until	Local Negotiations
8/12	7:24 - Until	Local Negotiations
8/19	7:24 - Until	Local Bargaining
9/4 - 9/5	7:00 - 3:00	Detroit Meeting
9/6	7:24 - Until	
9/19	9:00 - Until	Local Negotiations
9/23 - 9/24	7:00 - 3:00	Detroit Meeting
9/27, 9/30	7:24 - 3:24	Central Negotiations
10/1 - 10/3	7:00 - 3:00	Central Talks
10/4	1:00 - 3:00	Fells U/E

Date	Hours	Reason
10/7 - 10/11	7:00 - 3:00	Central Talks
10/14 - 10/18	Entire Shift	
10/21 - 10/25	7:00 - 3:00	Central Talks
10/28 - 11/01	Entire Shift	
11/13	12:24 - 3:24	John Birley W.C. Hearing
12/19 - 12/20	7:00 - until	Central Committee Meeting
<u>1992</u>		
1/8	7:00 - 3:00	Rally Hanover (Spector)
1/27 - 1/29	7:00 - 3:00	Central Rallies
2/10 - 2/11	7:00 - 3:00	Central Committee Meeting
2/18 - 2/21	7:00 - 3:00	Central Bargaining
3/10 - 3/12	7:00 - 3:00	Central Committee Meeting
3/16 - 3/18	7:00 - 3:00	Negotiation
3/23	7:00 - 3:00	
3/24 - 3/27	7:00 - 3:00	Central Bargaining
4/7	7:00 - 3:00	Stock Holders Meeting
		Central Committee Meeting
4/8	7:00 - 3:00	Central Committee Meeting
4/13, 14, 15	7:00 - 3:00	Central Negotiations
4/20	2:00 - 3:00	Brown Visit
5/1	7:24 - 3:24	Central Committee Meeting
5/14	7:24 - 3:24	Central Bargaining Comm. Mtg.
5/15	7:24 - Until	Central Bargaining Comm. Mtg.
5/20 - 5/22	Full Shift	Central Committee Meeting
6/1 - 6/3	7:24 - 3:24	
6/15 - 6/19	7:00 - 3:00	Convention
8/10	8:00 - Until	Cass Meeting
9/30 - 10/2	7:24 - 3:24	Central Committee Meeting
10/9	10:00 - 12:00	
11/4	1:30 - 3:30	Parking Lot Rally

[Exhibit E]

Summary of Information on Terry Orndorff's Pay Stubs From Caterpillar

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
May 27, 1990	46*/	
June 3, 1990	8	Holiday Pay; No 6 hrs.
June 10, 1990	30*/	
June 17, 1990	46*/	
June 24, 1990	14*/	
July 1, 1990	46*/	
July 8, 1990	46*/	8 hrs. Holiday Pay
July 15, 1990	46*/	
Vacation Period	No Pay	
August 5, 1990	0	Summer School; No 6 hrs.
August 12, 1990	38*/	
August 19, 1990	14*/	
August 26, 1990	46*/	
September 2, 1990	46*/	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
September 9, 1990	46*/	8 hrs. Holiday Pay
September 16, 1990	46*/	
September 23, 1990	14*/	
September 30, 1990	46*/	
October 7, 1990	46*/	8 hrs. Absence Pay
October 14, 1990	46*/	
October 21, 1990	46*/	
October 28, 1990	46*/	
November 4, 1990	14*/	
November 11, 1990	46*/	
November 18, 1990	46*/	
November 25, 1990	46*/	16 hrs. Holiday Pay
December 2, 1990	46*/	
December 9, 1990	108*/	42 hrs. Att. Bonus
		20 hrs. Absence Pay

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
December 16, 1990	46*/	
December 23, 1990	46*/	
December 30, 1990	16	Holiday Pay; No 6 hrs.
January 6, 1991	46*/	16 hrs. Holiday Pay
January 13, 1991	46*/	2 hrs. Absence Pay
January 20, 1991	46*/	
January 27, 1991	46*/	8 hrs. Holiday Pay
February 3, 1991	46*/	
February 10, 1991	46*/	4 hrs. Absence Pay
February 17, 1991	46*/	
February 24, 1991	0	
March 3, 1991	46*/	
March 10, 1991	46*/	
March 17, 1991	46*/	
March 24, 1991	0	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
March 31, 1991	46*/	8 hrs. Holiday Pay
April 7, 1991	46*/	
April 14, 1991	46*/	
April 21, 1991	46*/	16 hrs. Absence Pay
April 28, 1991	46*/	
May 5, 1991	46*/	
May 12, 1991	44*/	
May 19, 1991	46*/	
May 26, 1991	46*/	
June 2, 1991	8	Holiday Pay; No 6 hrs.
June 9, 1991	46*/	
June 16, 1991	0	
June 23, 1991	46*/	
June 30, 1991	30*/	
July 7, 1991	46*/	16 hrs. Holiday Pay
July 14, 1991	30*/	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
Vacation Period	No Pay	
August 4, 1991	22*/	
August 11, 1991	42*/	
August 18, 1991	43.5*/	
August 25, 1991	38*/	
September 1, 1991	44*/	
September 8, 1991	22*/	8 hrs. Holiday Pay
September 15, 1991	46*/	
September 22, 1991	43*/	
September 29, 1991	22*/	
October 6, 1991	20*/	
October 13, 1991	0	
October 20, 1991	14*/	
October 27, 1991	0	
November 3, 1991	0	
November 10, 1991	38*/	
November 17, 1991	43*/	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
November 24, 1991	46*/	
December 1, 1991	46*/	16 hrs. Holiday Pay
December 8, 1991	110*/	44 Att. Bonus 20 hrs. Absence Pay
December 15, 1991	46*/	
December 22, 1991	35*/	
December 29, 1991	30*/	16 hrs. Holiday Pay
January 5, 1992	38*/	16 hrs. Holiday Pay
January 12, 1992	38*/	
January 19, 1992	46*/	
January 26, 1992	44.5*/	8 hrs. Holiday Pay
February 2, 1992	22*/	
February 9, 1992	46*/	
February 16, 1992	30*/	
February 23, 1992	25*/	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
March 1, 1992	46*/	
March 8, 1992	46*/	
March 15, 1992	14*/	
March 22, 1992	22*/	
March 29, 1992	0	
April 5, 1992	46*/	
April 12, 1992	30*/	
April 19, 1992	22*/	8 hrs. Holiday Pay
April 26, 1992	44.5*/	8 hrs. Absence Pay
May 3, 1992	38*/	
May 10, 1992	46*/	
May 17, 1992	35*/	
May 24, 1992	22*/	
May 31, 1992	46*/	8 hrs. Absence Pay 8 hrs. Holiday Pay
June 6, 1992	22*/	

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
June 14, 1992	46*/	
June 21, 1992	0	
June 28, 1992	46*/	
July 5, 1992	56*/	8 hrs. Holiday Pay (includes 4 hrs. of overtime pay)
July 12, 1992	46*/	
Vacation Period	No Pay	
August 2, 1992	46*/	
August 9, 1992	46*/	
August 16, 1992	46*/	
August 23, 1992	46*/	
August 30, 1992	46*/	
September 6, 1992	46*/	
September 13, 1992	46*/	6 hrs. Absence Pay 8 hrs. Holiday Pay

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

<u>Pay Period Ending</u>	<u>Number of Hours Paid By Caterpillar</u>	<u>Comments</u>
September 20, 1992	41*/	3 hrs. Absence Pay
September 27, 1992	46*/	
October 4, 1992	22*/	
October 11, 1992	46*/	
October 18, 1992	46*/	8 hrs. Absence Pay
October 25, 1992	46*/	
November 1, 1992	46*/	
November 8, 1992	44*/	
November 15, 1992	46*/	

[Other Exhibits Omitted by Designation]

*/ Includes 6 additional hours pursuant to Sec. 4.6 of 1988 Central Agreement, recorded on pay stub as 4 hours of regular pay and 2 hours of overtime pay.

EXCERPTS FROM
THE DEPOSITION OF TERRY ORNDORFF

[September 20, 1995]

* * *

[8]

Q. Thank you very much, sir. Mr. Orndorff, you are a member of UAW Local 786?

A. Yes, sir.

Q. And that is one of the Defendants in [9] this lawsuit; is that correct?

A. Yes.

Q. How long have you been a member of Local 786?

A. Since April 25th, 1969, twenty-six (26) years plus.

Q. And are you a member in good standing in Local 786?

A. Yes.

Q. Have you held any positions in Local 786?

A. Positions?

Q. Yes, union offices.

A. Offices. I was a committeeman for nine years prior to becoming chairman and this is my second term. I have five years in as chair.

Q. When did you first become—. Prior to committeeman, did you hold any positions in Local 786?

A. No.

Q. When did you first become a committeeman?

A. I believe that was 1981, would've been June.

Q. And what were your duties and [10] responsibilities as a committeeman?

A. I had responsibilities for areas of the shop defined by the contract to represent the people and enforce the contract.

Q. And what areas of the shop did you have responsibilities for?

A. I had the B-building area, maintenance and materials positions. E-building, the heat plant which turned into co-generation and some facets of C-building, the maintenance area in C-building.

Q. And did you hold any—were you working for Caterpillar while you were a committeeman?

A. I was—as an as-needed—considered as-needed or as-necessary committeeman, which was basically necessity to work 40-hours trying to resolve problems or avoid problems.

Q. So you worked—while you were a committeeman, you spent your 40-hours doing committeeman work?

A. And that wasn't enough, yes.

* * *

[18]

Q. Are there any non-York Caterpillar employees who are members of Local 786?

A. Non-York—what?

Q. Non York, non Caterpillar employees who are members of Local 786?

A. All the members of Local 786 are Caterpillar employees at the York facility.

* * *

[23]

Q. Now, do chairman of the grievance and bargaining committee is a full-time position; is that correct?

A. I am under 4.6 of the Central Agreement that says I am considered full-time.

Q. Let me ask you this question. Prior to November 16th, 1992, was the chairman of the grievance and bargaining committee a full-time [24] position?

A. I worked on the job 50 to 60 hours a week without any trouble.

* * *

[28]

Q. Okay. What does then—what do you do as the chairman of the grievance and bargaining committee as of November 15th, 1992?

A. Try to interpret and enforce the contract on behalf of the members of Local 786.

Q. Anything else?

A. I don't understand what you mean.

Q. Did you do anything else in carrying out your duties?

A. A lot of things that were not spelled out there as far as joint things between the Company and union that, again, were in the best interest of the members of Local 786.

Q. Okay. What joint things did you—?

A. We were involved in ESP, the Continued Learning Improvement Process which was something that was going pretty strong, the joint training. We were trying to get some programs set up in

* * *

[33]

Q. Prior to November 16th, 1992, where did you perform your duties and responsibilities as chairman of the grievance and bargaining committee?

A. At the union hall and in the plant.

* * *

[44]

Q. Did you have regular hours at the union hall?

A. I spent the day there. If you wanted to spend something other than the day there, affording the day-type shift, you would have to get approval through Labor Relations, some of the past chairmen had maybe wanted to come in on—for the shift on second shift or the shift on third shift, and you'd have to get that approval. But the basic shift was the first shift. The cards even designate seven four to three four.

Q. I'm taking about when you performed your work at the union hall.

A. Yes.

Q. What time would you get to work?

A. I'd normally get there 6:30.

Q. Okay.

A. Quarter to seven.

Q. Did you ever get there later?

A. Oh, I can't say I didn't have days I got there later, I'm sure I've had day or two later. Normally it was 6:30, quarter to seven.

Q. On the days that you got there later, [45] did you have to call anyone at Caterpillar to request permission to come in late?

A. I'd—my shift was basically seven 24 and I don't know if that I went beyond that. If it was something other than that, it was probably a call out. And I would identify that to Labor Relations.

Q. Did you ever leave early?

A. If I'd taken personal time or call out, yes.

Q. Did you ever call and request permission from Caterpillar to leave early?

A. Yes.

Q. And—

A. I'm sure I did, yes.

Q. And that would be in the case of a call out?

A. Well, it could be. I'd call over and if I wanted two hours or more I could call over and say, I'd like to have two hours paid absence this afternoon and normally they'd allow me to have it.

Q. How did the paid absence allotment work?

A. You have 50 hours per year paid absence allowance, if you are an active member October 1st and go to work at least one tenth of an hour. [46] That's all employees.

Q. I take it you missed some days of work while you were a committeeman; is that correct?

A. Yes, sir.

Q. Did you have to call Caterpillar to get permission to miss a day of work?

A. I'd have to report it.

Q. That would be part of your time sheet?

A. Well, when I'd fill out the card—what you did is filled out the back of the card and put down absence, vacation days, paid absence day. If you didn't have paid absence it was just plain absence. You know, whatever.

Q. Just so I'm clear. You've got a cold. You're absent. You're going to not be at the union hall because you're sick. Would you have to call Caterpillar and notify them in advance that you were not going to be at the union hall?

A. As soon as possible, I would have to notify them. If it was—that might have been something that when I got sick I'd call either Harold Bouser (phonetic) or if I couldn't get a hold of Harold Bouser I'd talk to the hall and identify—tell them to identify the company that I'm off sick today. I had to report that I [47] was off.

* * *

[64]

Q. And finally, it says, such chairman will exercise only the privileges above set forth of [65] those which have otherwise been mutually agreed upon. Were there any privileges other than the ones we've talked about in the contract, that were mutually agreed upon?

A. Probably the most important was we didn't even use the pass by that language. We had an understanding that I could go in and get involved in situations to try and resolve them prior to them becoming grievances. That happened a lot of times, I went in and discussed issues with managers that isn't spelled out there to try and resolve issues. It was an ongoing thing, being in the

shop. I've gotten in all kinds of things. The CLIP meetings, the ESP meetings, the joint training meetings, all those are not spelled out there.

Q. What is CLIP?

A. Continued Learning Improvement Process.

Q. Okay.

A. It was a—it was an education program that Caterpillar started.

Q. Okay. And what was—what did you do on CLIP?

A. I sat as part of that committee.

Q. And how often did that committee meet?

[66]

A. Oh, I have notes—I'm not sure of the exact dates. It was a regular basis, it was a regular basis. I can't say exactly the dates.

Q. No, I'm just saying was it like monthly—?

A. No. If I'd say it was—my estimate was basically a weekly thing for awhile.

Q. Okay. And you mentioned ESP, that stands for Employee Satisfaction Process. And what were your responsibilities with regards to ESP?

A. I was on that committee.

Q. And what did you do on that committee?

A. Well, we reviewed things, we set policy, whatever was necessary until it was suspended.

Q. And you were Local 786's representative on ESP?

A. I was one of them, yes.

Q. Who were the other representatives?

A. The president sat in on it. And we had facilitators and coordinator.

* * *

EXCERPTS FROM
THE DEPOSITION OF HAROLD BOOZE

[September 21, 1995]

[7] ATTORNEY KAHN:

Let the record show that we are here on the 30(b)(6) deposition notice to Caterpillar Inc. in the matter of Case 1: 92-CV-1854 Caterpillar Inc. versus International Union, UAW and Local 786. This deposition is being taken pursuant to the Federal Rules of Civil Procedure.

EXAMINATION

BY ATTORNEY KAHN:

Q. Mr. Booze, will you please state your full name?

A. Harold, middle initial, C. Booze, B-O-O-Z-E.

Q. Mr. Booze, have you ever had your deposition taken before in a lawsuit?

A. Yes, I have.

Q. So are you aware that basically the purpose of this deposition is to—I'll be [8] asking you questions and you'll answer them to the best of your personal knowledge?

A. Yes, I do.

Q. And if you have any question, if you don't understand a question that I ask you, please ask me to clarify it.

A. Okay.

Q. And do you have any disability that would prevent you from being able to answer and understand the questions that I give to you today?

A. No, I do not.

Q. Or are you on any medication or any kind of drugs that would affect your ability to answer—understand the questions and answer them truthfully?

A. No.

Q. And you know that everything here will be on the record?

A. Yes.

Q. Where do you reside, Mr. Booze?

A. I reside in York, Pennsylvania.

Q. What's your address?

A. 2262 Boddington, B-O-D-D-I-N-G-T-O-N, Place.

Q. Now, I have a Notice of Deposition that [9] asks for a witness who could testify as to the following with regard to the weekly check issued by Caterpillar to Terry Orndorf and Edward Benedict during the period May 1st, 1990 through March 31st, 1993, the approval process to authorize the issuance of checks. Do you have personal knowledge about that process?

A. Yes, I do.

Q. The decision to categorize pay as regular pay or overtime pay, do you have personal knowledge about that?

A. Well, I'm not aware that overtime pay is an issue here in this particular situation, but as a general understanding of overtime and straight time pay, I have that understanding.

Q. Okay. Well, we'll ask you questions and I'm sure you'll be able to answer. In the amount of such checks in

the accounting of such payments on Caterpillar and in its books?

A. I really don't have knowledge of the paychecks issued and the amounts of those checks. I don't have that knowledge.

ATTORNEY KAHN:

If Mr. Booze is not able to answer the questions, because he doesn't

* * *

[14]

Q. Prior to Mr. Orndorff being grievance chair, do you know what department he was assigned to?

A. No, I do not.

Q. Now, you were Labor Relations manager until September 1992; correct?

A. Correct.

Q. Are you aware of the fact that Mr. Orndorff and Mr. Benedict were assigned to the Labor Relations Department, at least between May of 1990 and September of 1992?

A. I'm not exactly sure how all of those, you know, records were. That may very well be the case, that they would have been assigned to my department. That could very well be.

Q. As the manager of the department, did you have any budgeting responsibilities?

A. Yes, I did.

Q. So, if Compensation for your employees was—was that part of the budget for your department?

A. Yes.

Q. In thinking back about reviewing the budget during those years when you were Labor Relations manager from 1990 until 1992, does it [15] refresh your recollection that Mr. Orndorff and Mr. Benedict were assigned to the Labor Relations Department?

A. Well, I think they probably were. I think when they took office, they would have been transferred to my department. That seems to be—that seems to be right to me, yes.

Q. Now, are you—do you know why they were transferred to Labor Relations rather than some other department?

A. No. That would have just been a decision that was made at sometime prior to my coming to York.

Q. Do you know who, if anyone, would know the reason why they decided to assign the grievance chair and alternate to the Labor Relations Department?

A. I don't know, because I don't know when that was done. I don't know who would have been the people involved at that time.

Q. So it was before 1980—January of 1988?

A. Yes, it would have been.

Q. Now, you are aware, are you not, that Caterpillar paid wages to Mr. Orndorff and Mr. [16] Benedict during this period of time from May of 1990 to November of 1992, November 15th of 1992?

A. Yes. I don't know how you categorize it, I'm aware that they were paid by Caterpillar during this period of time.

Q. They were paid by Caterpillar. Okay. Well, let me show you a document I'd like label this, Booze Deposition Exhibit One, A through E. Let me show you these documents and ask you if you can identify them?

A. Yes.

Q. Can you describe what you see there?

A. I see W-2 Forms for Terry Orndorff and Ed Benedict.

Q. They're issued by Caterpillar; are they not?

A. Yes.

Q. And do you have any reason to doubt that those are the accurate W2 Forms issued to these gentlemen?

A. No, I have no reason at all to question it.

Q. These W-2 forms report in box ten an amount for wage, tips and other compensation—on each of them. Do you know what kind of wages, [17] tips or other compensation those numbers reflect?

A. They would reflect the checks that Caterpillar issued to these individuals during the course of the year.

Q. Do you know what these checks were for, what kind of pay?

A. I guess, I'm not sure I understand your question.

Q. Let me ask another series of questions just to lead up to it. In the Labor Relations office, were the—do you know if Mr. Orndorff and Mr. Benedict were paid on an hourly basis or a salary basis or what kind of basis?

A. Paid on an hourly basis.

Q. Do you know if there were other employees in the Labor Relations office during this period of time that

were paid on an hourly basis or were the other employees paid on a salary basis?

A. These were the only two individuals paid on an hourly basis.

Q. Now, are paychecks issued at Caterpillar on a weekly basis, bi-weekly basis, does it depend on the kind of employee?

A. It depends on the payroll, hourly is on [18] a weekly basis.

Q. What are the other payrolls that you have?

A. We have salary, which is issued twice monthly.

Q. Twice monthly?

A. Yes. And management which is issued once a month.

Q. And Orndorff and Benedict, during this period of time, May of '90 and subsequently were carried on the hourly payroll?

A. Correct.

Q. Now, do you know if there were other—are all of the hourly employees in the UAW bargaining unit at Caterpillar? Or let me rephrase the question. Are there any hourly employees at Caterpillar who are not on the UAW bargaining unit?

A. No.

Q. So they're all in the UAW bargaining unit?

A. Yes.

Q. Are any of the—now, are you familiar with the steps that were necessary for Mr. Orndorff and Mr. Benedict to go through and for [19] Caterpillar to go

through in order for a paycheck to be issued to the two of them on a weekly basis?

A. Yes, I am.

Q. Would you please describe to the best of your knowledge what that process entailed?

A. Each week they would submit a documentation of their time to the factory accounting clerk.

Q. To whom?

A. Factory accounting clerk, who would fill out a form and bring it to me to approve. And it would have the documentation cards with it.

Q. What was the form that the—was there a particular form of documentation that Benedict and Orndorff were to submit to the factory accounting clerk?

A. I don't recall a particular form, I think they just wrote it on a card and submitted it to the factory accounting clerk.

Q. Who was the factory accounting clerk during this relevant period?

A. Well, any one of them, because the one who did it the most was Carl Huff. There were others from time to time, but Carl most often did it.

[20]

Q. What are the duties of a factory accounting clerk?

A. They're basically responsible for the records, the attendance records, which for the hourly payroll which control then the pay that's issued to each employee each week.

Q. Is Carl Huff still with Caterpillar—still employed by Caterpillar; do you know?

A. Well, not for sure. We've had a lot of retirees. I don't know—they all are individually. So I'm not aware for sure at this point one way or the other.

Q. So you believe that Orndorff and Benedict would submit documentation to one of the factory accounting clerks who then you say would fill out a form and submit it to you for your approval?

A. Correct.

Q. Was the form that—what was the form called that the factory accounting clerks would submit to you?

A. I don't really know the name for it. It was a card that had the listing of each day and what the code was for that day.

Q. Let me just show you this document and [21] ask you if that form means anything to you? Do you recognize that form?

A. Yes. I think that's the form that I was given each week to approve. You know, this is obviously a blank one.

Q. That's correct. Although it does have Orndorff's name and numbers.

A. That has his name on it, but these codes would not necessarily apply in all of these. There could be changes in those codes.

ATTORNEY KAHN:

Why don't we for the moment get this document marked and then I'll ask you couple questions about it. Could we mark this as Deposition Exhibit Two, please?

BY ATTORNEY KAHN:

Q. Looking at this document marked Exhibit Two, titled Your Hourly Employee Special Pay Memo, York, excuse me, Hourly Employee Special Pay Memo. You just were discussing that under the column, off—why don't you describe what your statement—your point was. This form is filled out H1H1H1H1H1 and then I. Can you explain what those letters mean?

[22]

A. Well, H1 is, I believe, stands for Company - Paid Union Business.

Q. Is there a document that sets forth what the authorization codes are? You know, what H1 stands for?

A. Yes. We have some kind of a document that has those codes.

Q. Do you know what that document would be called?

A. No, I don't.

Q. A document that contains the authorization codes would identify it?

A. Yes.

Q. And you were stating before that these codes wouldn't always apply?

A. That's correct.

Q. Would you please explain what you mean by that?

A. Well, the basis of the pay for Terry and Benny is based upon the contractual provision that where the company agreed that they would pay for certain union activities that were performed by these individuals. And so anything, any time—spend in something other than

those activities, if they were out of town to union meetings, various [23] things, negotiations, whatever, then, I believe the code for that was H2. Because H referred to union business and one I think was company paid and two was non-company paid. So there would be times that he would be out of town on other business and activities for the union, so that would carry an H2 code. If he took a day off there would be a different code for that day. If he took vacation, there would be a different code for vacation day, those kind of things.

Q. Now, I see under department on the left, is a 06, do you know what 06 is?

A. Yes, I believe that's Labor Relations.

Q. Now, the factory—when the factory accounting clerk passed this on to you, did it have the employee's signature on it?

A. Yes, I believe it did.

Q. And was there—you had indicated they had marked something on a card or on the back. Was there usually something on the back that you filled out?

A. I think it was on the back, because I can remember, you know, with the vision I have is a white piece of paper, card, whatever, when I would see what they had actually written and I [24] think it very well might have been the back of this card.

Q. Let me show you a document and ask you if you can just sort of generally recognize whether that's the kind of itemization, as an example, that would occur on the back of one of these cards? Not that that is exactly what occurred on some form in June of 1991, but that type of notification—of documentation?

A. Yes. It would be in some form of this, yes.

ATTORNEY KAHN:

Let me mark this as Booze Deposition Exhibit Three, please.

BY ATTORNEY KAHN:

Q. Now, let me ask you a few questions about this document that we've marked Exhibit Three. I see on there that there is a—six hours at the bottom that is labeled contract; do you know what that meant?

A. Yes. The contract provides that if the committeeman or alternate committeeman spends at eight hours doing union business in that week, then they're entitled to an extra six hours pay for that week.

[25]

Q. So on the example here, we have three eight hour days marked pay by company. One eight hour day says union business and another says paid absence?

A. Yes.

Q. So in that week under the contract the employee would be entitled to six additional hours of pay?

A. Yes.

Q. Did the company pay for the paid absence time?

A. Yes, they did. Up to 50 hours a year.

Q. Which is in the 50 hour limit is in the collective bargaining agreement?

A. It's in the labor agreement, yes.

Q. Did the factory accounting clerk have any role other than basically just passing on this documentation

to you. Did that person have any responsibilities to verify the accuracy of this information?

A. Not that I'm aware of.

Q. And when it came to you, what did you do?

A. I reviewed it and then if it was correct, I signed it. If it wasn't, I would note [26] the discrepancy and we would resolve that and then I'd approve it.

Q. Did you always—are you always the person who signed these or approved these or was there anyone else who had the authority to do that as well?

A. Well, there was a period of time where I was the only one authorized to do that, yes.

Q. Do you know what that period of time was that you were the only one?

A. Well, at least up until, I guess, '91, I believe, 1991.

Q. You were the only one?

A. Yes.

Q. And that at what point—and then someone else also had authority or took over your authority; which?

A. I think at that point they took over the—I put a Labor Relations representative on my staff and, you know, he picked up some of the duties I was doing. At some point he—that responsibility was given to him. I can't tell you just exactly when it was.

Q. Sometime in 1991 you think?

A. I believe that's right.

[27]

Q. Who was the person that took over that responsibility?

A. Larry Staker, S-T-A-K-E-R.

Q. Is he still with the company?

A. Yes, he is.

Q. And what's his position?

A. Labor Relations manager.

ATTORNEY KAHN:

Can we go off the record, please?

OFF RECORD DISCUSSION

BY ATTORNEY KAHN:

Q. Mr. Booze, you mentioned that you reviewed at least until Mr. Staker took over the responsibility, these forms turned in by Benedict and Orndorff, signed off if they were accurate; is that correct?

A. Yes.

Q. And if you saw any discrepancy, it got taken care of, something like that. Can you describe what you mean?

A. Yes. If there was a notation on there, say, for example, a day that they were asking for the company pay when I knew it was a day that they were on other union business, not company paid, [28] you know, just make those kind of corrections, that were done most generally on the spot when the factory accounting clerk was there with the card, because he'd generally bring them to me personally. And then we'd—I'd go ahead and sign off on it then.

Q. If you made a change in the card as submitted by Mr. Orndorff or Mr. Benedict, did you talk to them about it?

A. I didn't, no.

Q. Do you know if anyone did?

A. I don't know if the factory accounting clerk did or not.

Q. Now, between—how often would you say that you found a discrepancy in which either let's say, Mr. Orndorff requested company pay for sometime that you thought the company shouldn't pay for because of union business, as you put it?

A. Seldom.

Q. Were there sometimes when they marked off union business or whatever and you thought the company really should pay for it?

A. I don't know the nature of those at this point. Like I say there they were very, very few of them, you know, but just sometimes those kind [29] of things happen.

Q. So the paycheck that ultimately resulted after—let's ask you, after you approved it, you signed the supervisor's approval line, is that the way you would have signed it?

A. I would have signed on that line, yes.

Q. And then what happened to the form?

A. The factory accounting clerk would take it, submit it into the system, the check would be generated based upon that information.

Q. Are the checks generated at York or where are they generated?

A. We print the checks at York.

Q. Does the information get sent to any central place, Peoria or any other—?

A. Yes, it does.

Q. Prior to the checks being printed?

A. Yes.

Q. So Peoria, somewhere in the Caterpillar system has a record of this information?

A. Yes.

Q. And where in Peoria or what department in Peoria does the information on the hours that Mr. Orndorff and Mr. Benedict are putting in for?

A. I think they call themselves payroll,

* * *

[36]

Orndorff and Mr. Benedict, to the best of your knowledge do they contain paystubs as well?

A. Yes.

Q. Let me show you this document (indicating) and ask you if you can identify it?

A. Yes. That appears to be a checkstub for Terry Orndorff.

ATTORNEY KAHN:

Okay. I'd like to mark this Booze Deposition Exhibit Number Four, please.

ATTORNEY PETERSON:

This is before Mr.—oh, no, it's not. Is that 4/26/92?

ATTORNEY KAHN:

Yes.

ATTORNEY PETERSON:

Okay.

BY ATTORNEY KAHN:

Q. I see here four entries or three entries at the top, Regular Pay, ABS Pay and Overtime P, do you know what regular pay stands for?

A. Regular pay would be in reference to the regular 40 hours pay per week.

Q. In this case it was 34 and a half?

[37]

A. That's correct.

Q. And then there is ABS pay, do you know what that is?

A. Yes. I believe that's absence pay.

Q. Would that be the pay that you said the company paid up to a contractual limit of 50 hours for absence?

A. Yes.

Q. Do you know what overtime P is?

A. Well, I'm not for sure, it would appear to be pay for overtime.

Q. Now—

A. What's puzzling about it is I don't know—I would not understand the two hours.

Q. What do you mean when you say you would not understand the two hours?

A. Well, because as a committeeman, a full-time committeeman, Mr. Orndorff was not eligible for any overtime.

Q. Do you know if that rate that shows there, the current pay of \$32.48 was an overtime rate or was just straight pay, in fact?

A. It appears to be straight time pay.

Q. Listed under the category overtime pay?

A. Yes.

[38]

Q. Now, would there be any circumstances in which the committeeman would get overtime pay that you're aware of while—?

A. I'm not aware of any.

Q. Same with the alternate committeeman?

A. Yes, because they were actually on leave of absence. They were not active employees. They were not in the shop working and were not eligible for any overtime.

Q. When you say they were on leave of absence, do you mean by that they were not in the shop working?

A. No. The contract specifically specifies that they're considered to be on leave of absence.

Q. Considered to be on leave of absence I think is the language; correct?

A. Yes.

Q. Well, let me show you another document for just a minute, which is a paystub for Mr. Orndorff a week later, 5/3/92. Does this appear to be a paystub for him?

A. Yes, it does.

Q. You agree. And let me show you yet another one for the next week and ask you if that appears to be his paystub for the pay period [39] ending 5/10/92?

A. Yes.

ATTORNEY KAHN:

Why don't we mark these Booze Deposition Exhibits 5A and B. We'll put the—.

ATTORNEY PETERSON:

Is this going to be an exhibit?

ATTORNEY KAHN:

Yes. That was four. Well, the 4/26 one is four.

BY ATTORNEY KAHN:

Q. Now, I see in Exhibits 5A and 5B, which are paystubs for May 3rd, 1992 and May 10th, 1992 respectively. Once again showing two hours of overtime pay for both of those pay periods; correct?

A. Yes.

Q. And again, at a rate that you say appears to be straight time rate, not an overtime rate?

A. That's correct.

Q. What is the overtime rate, by the way? Is it time and a half?

A. It depends on what day it's worked, if [40] it's time and a half or double time.

Q. But at least time and a half?

A. Yes.

Q. Do you know why these paystubs reflect two hours of overtime pay in each of these three pay periods?

A. No. I have to presume it has to do with the—.

ATTORNEY PETERSON:

Don't presume.

BY ATTORNEY KAHN:

Q. Well, let's look at the 5B, the pay period ending 5/10.

A. Yes.

Q. I see that there's 44 hours of regular pay and two hours under the overtime pay line; correct, for a total of 46?

A. Yes.

Q. That is the maximum amount of hours that Caterpillar would pay the committeeman, Mr. Orndorff; correct? Under the contract?

A. Yes.

Q. Now, this shows 44 hours of regular pay, the contract—does the contract provide 44 hours of regular pay anywhere that you know of?

[41]

A. No.

Q. And you have—and how many hours does it pay—provide for regular pay?

A. The regular week is 40 hours.

Q. Now, you've testified that you do not know why the paystub reflects two hours of overtime pay; correct?

A. That's correct.

Q. Do you know why it reflects 44 hours of regular pay?

A. No, not as fact, I don't. Because I don't know the payroll procedures.

Q. But have you ever—or at least while Mr. Orndorff was committee chair, did you ever authorize overtime pay for him?

A. No, I did not.

Q. But you did authorize the extra six hours?

A. Yes, I did.

Q. When?

A. When it was appropriate, I authorized it.

Q. Do you know who in Caterpillar would know about the decision to categorize pay as regular pay or overtime pay?

[42]

A. I don't know specifically a name of someone in corporate payroll, no.

Q. Corporate payroll being located where?

A. Peoria.

ATTORNEY KAHN:

Mr. Peterson, the deposition notice requested a Depo-
nant able to speak to the decision categorize pay as
regular pay or overtime pay, do you have another
Deponant available?

ATTORNEY PETERSON:

No, I don't. I misunderstood, because it's my under-
standing of the contract that none of Mr. Orndorff's or
Mr. Benedict's pay was overtime. It was all straight
time. So I—no, I don't, and that's the reason why.

ATTORNEY KAHN:

Well, can you provide a Deponant or we can do Discov-
ery, written Discovery—

ATTORNEY PETERSON:

Oh, absolutely.

ATTORNEY KAHN:

—between now and the end of [43] Discovery to respond to the inquiry as you—do you now understand?

ATTORNEY PETERSON:

Yes. As a matter of fact, if you could give me copies of those stubs—

ATTORNEY KAHN:

Sure.

ATTORNEY PETERSON:

—so that I can check that out.

ATTORNEY KAHN:

Fine.

BY ATTORNEY KAHN:

Q. While we have the paystubs in front of us could you—let's take a look at—let's take a look at the—at 5A. I see at near the bottom there's an entry called Vacation Accum. Do you have know what that entry means?

A. No.

Q. Do you know what the—whether the contract provides anything regarding vacation pay or accumulated vacation pay for the committeeman and alternate committeeman?

A. Yes.

[44]

Q. What does it provide?

A. They are eligible for the vacation pay as identified in the labor agreement.

Q. Do you know where the labor agreement spells that subject out?

A. I believe it's Article Nine.

Q. And does the committeeman and alternate committeeman, under Article Nine, basically have entitlement to vacation pay as if they were rank and file bargaining unit members?

A. They are entitled to what Article Nine provides for vacation pay.

Q. Does it provide anything different for the committeeman or alternate committeeman than for other employees?

A. Not, it does not.

Q. And then there's another entry at the very bottom of the card, A-T-T-B-O-N Accum. Do you know what that stands for?

A. Yes.

Q. What is that?

A. Attendance bonus accumulation.

Q. And could you explain that, please?

A. For each week of perfect attendance as defined by the contract of the employee, received [45] at this time, I don't know if it was an hour or an hour and a half, but attendance bonus accumulation.

Q. And to the best of your knowledge does the contractual provision on attendance bonus accumulation apply

the same to the committeeman and the alternate committeeman as it does to other employees covered by the collective bargaining agreement?

A. Yes, it does.

Q. There are no special provisions for them?

A. No.

Q. And then on the far right where it says T-O-T-A-B-S-H-R taken, and it says on line eight. Do you know what that stands for?

A. Yes. That would be total absence hours taken.

Q. Do you know what—in what period of time that refers to?

A. The calendar for paid absence allowance starts with the first Monday in October each year and it runs for a year.

Q. And that's pursuant to the collective bargaining agreement?

[46]

A. Yes, it is.

Q. Do you know which article that is?

A. That's in Article 15, it's within the first five sections of Article 15. I'm not sure, I think it may be 15(1).

Q. And does that provision of the contract apply to the committeeman and the alternate committeemen in the same manner that it applies to other bargaining unit members?

A. Yes, it does.

Q. Now, are you familiar with the epic—does the word epic, E-P-I-C, mean anything to you?

A. Yes.

Q. And what does that stand for?

A. I don't know.

Q. Can you describe what it is?

A. It's an acronym for the computer system that we have for personnel records.

Q. And let me show you a document and ask you if you can identify this?

A. Yes.

Q. And what is that?

A. That's a copy of an hourly employee profile of Terry Orndorff.

Q. Second page, the second page is what?

* * *

[50]

that correct?

A. Yes.

Q. Can you explain what that is?

A. That's the part of the job description for that classification. It's just part of the nomenclature.

Q. And shift?

A. It's a shift of which they're assigned.

Q. And then division/section name; what is that?

A. That's the division and section that they're assigned to at those points in time.

Q. And this actually shows that effective 5/21/90, Mr. Orndorff was assigned to Labor Relations; is that correct?

A. Yes.

Q. And then over here (indicating) on the last—next to the last column is division number; is that correct?

A. Yes.

Q. Is that just a number to coincide with the division/section name in the previous column?

A. That's correct.

Q. So number six is labor relations?

A. Yes.

[51]

Q. Do you know what number 29 is; is that a division number 29?

A. That's an area in the shop. The same one he was assigned to back during this period of time.

Q. Which period of time are you referring to?

A. Well, prior to 2/16 of '90.

Q. And what does this last column, factory—

A. Facility.

Q. Facility.

A. That's York. That means York.

Q. That number is York?

A. Yes.

Q. Okay. Is there any entry on here that shows that Mr. Orndorff had a personnel action—excuse me, was the committeeman?

A. Would you repeat your question, please?

Q. Is there any entry on that form that shows Mr. Orndorff became the committeeman?

A. No.

Q. Now, is there any entry on there—let me point you to the last entry in this section we were looking at before in which it appears that a [52] change was made of division and department from Labor Relations to drill/pins department 29. Can you explain that entry?

A. Yes. That records Mr. Orndorff being reassigned from Labor Relations to the drills division. At the time the company made the decision, the effective date that they would no longer pay the full-time union representatives for conducting the union business.

Q. Now, there's a form like this—is there a form like this for all hourly employees at Caterpillar, you know, a form that's called hourly employee profile?

A. Yes, there is.

Q. Let me ask you what these codes mean, if you know? Some of these codes under the column action, do you know what the action code that's reflected on 2/16 1990—excuse me, 5/21 1990 of DNC means?

A. I do not now that those codes mean.

Q. Let me just show you a document and ask you if you can recognize this document?

ATTORNEY PETERSON:

May I see it, Counsel?

ATTORNEY KAHN:

[53]

Of course.

A. Okay. Now what is your question?

BY ATTORNEY KAHN:

Q. Do you recognize that document?

A. Yes, I do.

Q. What is it?

A. That's a document that identifies the various action codes that are on the employee profiles.

Q. Now, the action codes are the same thing as the second column here (indicating) under action?

A. That's correct.

Q. That's what you're referring to?

A. Yes.

ATTORNEY KAHN:

Now, I'd like to mark this Booze Deposition Exhibit Seven, please.

BY ATTORNEY KAHN:

Q. I see that this has a date issued 7/1/91, supercedes issue date 10/1/88. I ask you—and I'm going to show this document and ask you if you can recognize it?

A. I have not seen this particular document before. I've seen that one (indicating).

[54]

Q. With reference to Number Seven, perhaps you can take a look at—with reference to it while we're—while I'm asking you some questions about the employee—hourly employee profile for Mr. Orndorff. I referred you to the entry for 5/21/90, which said DNC and you had said you didn't know off-hand what that was. Could you

refer to this document (indicating) and indicate what the code stands for?

ATTORNEY PETERSON:

By this document you're referring, for the record, TO Deposition Exhibit Number Seven.

ATTORNEY KAHN:

I'm referring to Deposition Exhibit Number Seven. Thank you.

BY ATTORNEY KAHN:

Q. And what does that code stand for?

A. Department division/section number change.

Q. And, in fact, this document reflects that as of that date there was a division change from 29 to 6 from drill/pins to Labor Relations; correct?

A. Correct.

* * *

[58]

Mr. Benedict were carried on the active hourly employee payroll; correct?

ATTORNEY PETERSON:

No, he's not testified to that.

A. No, I have not.

BY ATTORNEY KAHN:

Q. Okay. Well then, let me ask you again. Do you testify that they were carried on the hourly payroll; correct?

A. Yes.

Q. Were they carried—and you testified there were three payrolls, an hourly payroll, salary payroll and a management payroll; correct?

A. Yes.

Q. And the hourly payroll is there—are there subdivisions? Are there any breakdowns of the hourly payroll into different categories of employees?

A. I'm not sure that I understand that question. The hourly payroll is one category of employees.

Q. What is included in the hourly payroll?

A. All of the employees that are assigned to the hourly jobs performing, you know, the work primarily in the shop and those jobs which are [59] covered by the labor agreement.

Q. Is it your testimony that some of the employees on the hourly payroll are not active employees?

A. I haven't been asked that question.

Q. I'm asking you. Is it your—are some of the employees on the active—hourly payroll not active employees?

A. Yes.

Q. And what kind of employees are not active employees?

A. Employees who are on various leaves of absence.

Q. And what are the kinds of leaves of absence that exist?

A. Union leaves, there's medical leaves, personal leaves, family leaves. There's more than that, that's the ones I recall.

Q. Is it your testimony that Mr. Orndorff and Mr. Benedict, during this period of time, were on union leave of absence?

A. They were considered to be on leave of absence, that's correct.

Q. You referenced something called union leave of absence?

[60]

A. Yes. They, at that time, were not on leave under that provision, they were on leave under the provisions of, what is this, Article Four, I believe.

Q. Well, why don't we look at the collective bargaining agreement and ask you what you mean—who would be considered to be on union leave of absence, what kind of employees?

A. Article 14—.

ATTORNEY PETERSON:

Counsel, again, I'm not trying to be a obstrep with this, but what does this have do with the approval process of Orndorff or Benedict's checks, the decision to categorize their checks as regular or overtime pay or the amount of such checks and the accounting of such payments in Caterpillar's books?

ATTORNEY KAHN:

These are some books of Caterpillar which refer to various kinds of action codes and the accounting of the pay and the employment of Mr. Orndorff. It refers to certain kinds of codes.

* * *

[62] testifying about it, but I'm just saying we're getting pretty far afield.

ATTORNEY KAHN:

He testified just now, that there were certain people on the hourly payroll who were not considered active employees.

ATTORNEY PETERSON:

And what does that—?

ATTORNEY KAHN:

And there were people who were on various leaves of absence, and he started to describe the leaves of absence. One of them that I was going to question him about was the union leave of absence, because if—let me ask you this.

BY ATTORNEY KAHN:

Q. Mr. Booze, during the time that Mr. Orndorff was assigned to Labor Relations, between May 21st, 1990 and ending, apparently, 11/15, 1992, was he considered on the active payroll of Caterpillar?

A. He was considered to be on leave of absence.

[63]

Q. Was he considered to be on the active payroll? Was he—?

ATTORNEY PETERSON:

Counsel, the witness—counsel, you're assuming the fact not in evidence. The witness has told you there are three payrolls, hourly, salary and management. There is no, quote, active payroll. The witness has testified to that.

BY ATTORNEY KAHN:

Q. Was he considered an active employee on the hourly payroll?

A. No.

Q. What kind of employee was he considered?

A. To be on leave of absence.

Q. What leave of absence was he considered to be on?

A. I don't know if it's 14.10 or if it's 4.6, but he was considered to be—I think it's a 4.6 is very specific that they're considered to be on leave of absence. And he was functioning and they compensated in accordance with that provision.

Q. If he was being—is there a separate

* * *

[70] first full sentence on page, I believe it's 19 to the end of the paragraph.

ATTORNEY KAHN:

May I see the document you're looking at?

ATTORNEY PETERSON:

Yes. It's the Labor Contract. I'm looking at the Peoria Agreement.

A. He shall be paid for all such hours at the regular straight time hourly rate he was receiving just prior to his election. Adjusted for general increases and cost of living adjustment amounts if such there be as provided in Article 18 of this agreement. He shall be eligible for time off and/or payments in accordance with Articles Nine, Ten, Fifteen and Twenty of this agreement, provided such chairman will not receive payment for the same day under more than one of the provisions of this

Central Agreement. For purposes of the supplemental agreement relating to noncontributory pension plan, the group insurance plan attached to the insurance plan agreement and the supplemental unemployment benefit plan, such chairman will have the same coverage as though he was actively at [71] work.

BY ATTORNEY PETERSON:

Q. So, does Article 4.6 specifically provide for coverage—or for eligibility of the chairman of the grievance committee under Articles Nine, Ten, Fifteen and Twenty?

A. Yes, it does.

Q. Likewise, it provides for them specifically with regards to the noncontributory pension plan, the group insurance plan, the supplemental unemployment plan?

A. Yes.

Q. Does Article—strike that.

ATTORNEY PETERSON:

I have nothing further. Oh, I'm sorry, I do. May I take a look at Exhibit Two, which was the timesheet?

BY ATTORNEY PETERSON:

Q. Mr. Booze, I'm showing you a document which has been marked for identification as Booze Deposition Exhibit Number Two. And I point you to the column supervisor's approval. You testified that you signed that document?

A. Yes.

Q. Do you supervise Mr. Orndorff in the [72] performance of his duties?

A. No, I did not.

ATTORNEY KAHN:

I object to the line of questioning. It has nothing to do with the 30(b)(6) deposition.

ATTORNEY PETERSON:

Okay. You can move to strike it.

ATTORNEY KAHN:

I will.

BY ATTORNEY PETERSON:

Q. What was the purpose, if any—strike that. Was your purpose in signing that part of the approval process to authorize the issuance of the check?

A. Yes.

Q. So Mr. Orndorff was assigned to you—or to Labor Relations purely as an accounting purpose?

A. Yes.

ATTORNEY KAHN:

Are you finished?

ATTORNEY PETERSON:

[73] Yes.

ATTORNEY KAHN:

I'm sorry. I didn't know that you were.

RE-EXAMINATION

BY ATTORNEY KAHN:

Q. Mr. Booze, did you have any knowledge of any of Mr. Orndorff's activities?

A. I have knowledge of some of them.

Q. And if you believed that he was not entitled to pay that he was submitting time for, you had the ability to

take action to deny him the time—pay for the time; is that correct?

A. Well, that was not in the context of his activities. That was in the context of whether he was assigned to be performing the duties specified by the contract or he was out performing other duties or was on a day vacation or whatever. I was not verifying his activities in any way by signing the authorization.

Q. Under Article 4.6 of the contract, page 18—

A. Yes.

Q. —the contract on the second paragraph

* * *

[75] correct?

A. Well, no, not exactly. I did not verify how that time was spent in terms of activities. I was only verifying whether it was, you know, conditions for which we pay.

Q. But you would verify, by your signature, you either verified—you verified that the gentlemen were not putting in for Caterpillar time spent on negotiations or these other elements; correct?

A. I was accepting the information they gave me regarding those items, yes.

Q. And if you doubted the accuracy of the information they gave you, did you have methods available to question them on the accuracy?

A. Yes.

Q. And so if you ultimately signed a card with Caterpillar paying certain time, that was your accepting that they were not seeking pay for any of these excluded items; correct?

A. Yes.

Q. And similarly it was really your verification that they were not putting in for time spent in these four items; correct?

A. I don't know if I'd say—accept the [76] word verification. What I was doing was approving an accounting of the items for which we pay or don't pay under the contract.

Q. And you would not approve something that you were not comfortable with, accurate; is that correct?

A. That's correct. But by the same token, for example, under (iii), I never questioned anything, but if he would have attended a meeting somewhere outside of the union hall that I wasn't aware of, and didn't exclude that time, I would not have known that.

Q. But if you had any reason to question him, you could have done so?

A. Yes.

Q. And if you—did you have any reason during May 1990 to November 1992, to have reason to doubt the information that Mr. Orndorff provided to you on these timecards?

A. I accepted what he gave me on those timecards, except if there was an error that I knew there was a negotiations meeting or a union convention that he attended and there may be a mismatch of dates. Those are the only things that I was aware of.

				1990 Form W-2 Wage and Tax Statement		Copy C For Employee's Records This information is being furnished to the Internal Revenue Service	
1 Control number		CMB No. 1545-0008	2 Employer's name, address, and ZIP code CATERPILLAR INC. 100 N.E. ADAMS ST. PEORIA, ILLINOIS 61629				
3 Employer's identification number FED# 37-0602744	4. Employer's state I.D. number ST# 37-0602744						
			7 Allocated tips	8 Advance EIC payment	[unchecked boxes omitted by printer]		
			9 Federal income tax withheld 4981.10	10 Wages, tips, other compensation 34156.60			
			11 Social security tax withheld 2612.15	12 Social security wages 34156.60			

5 Employee's social security number 173-32-7110			13 Social security tips	14 Nonqualified plans	
19 Employee's name, address, and ZIP code 018-1-0006-00600-42449-1 T L ORNDORFF RO 3 BOX 406E HANOVER PA 17331		15 Dependent care benefits .00	16 Fringe benefits incl. in Box 10 10.45		
		17 E— 95.04	18 Other		
		22	23		
20	21	26 Name of state PA	27 Local income tax 340.51	28 Local wages, tips, etc.	29 Name of locality YORK
24 State income tax 715.11	25 State wages, tips, etc. 34131.56				

1 Control number	CMB No. 1545-0008	[boilerplate text omitted by printer]	
2 Employer's name, address, and ZIP code CATERPILLAR INC. 100 N.E. ADAMS ST. PEORIA, ILLINOIS 61629			
3 Employer's identification number FED# 37-0602744		4. Employer's state I.D. number ST# 37-0602744	[unchecked boxes omitted by printer]
5 Employee's social security number 173-32-7110			
		7 Allocated tips	
		8 Advance EIC payment	
		9 Federal income tax withheld 4679.87	
		10 Wages, tips, other compensation 32758.21	
		11 Social security tax withheld 2031.01	12 Social security wages 32758.21
		13 Social security tips	14 Medicare wages and tips 32758.21

19 Employee's name, address, and ZIP code T L ORNDORFF RO 3 BOX 406E HANOVER PA 17331 018-1-0006-00600-42449-1				15 Medicare tax withheld 474.99	16 Nonqualified plans
				17 See instrs. for Box 17 C— 91.72	18 Other
20				22 Dependent care benefits .00	23 Benefits included in Box 10 3.55
24 State income tax 834.97	25 State wages, tips, etc. 32736.49	26 Name of state PA	27 Local income tax 326.56	28 Local wages, tips, etc.	29 Name of locality YORK

Copy C For EMPLOYEE'S RECORDS

(See Notice on back.)

Department of the Treasury
Internal Revenue Service**Form W-2 Wage and Tax Statement 1991**

1 Control number	CMB No. 1545-0008	[boilerplate text omitted by printer]	
2 Employer's name, address, and ZIP code CATERPILLAR INC. 100 N.E. ADAMS ST. PEORIA, ILLINOIS 61629			
3 Employer's identification number FED# 37-0602744		4. Employer's state I.D. number ST# 37-0602744	
5 Employee's social security number 173-32-7110			
		7 Allocated tips	
		8 Advance EIC payment	
		9 Federal income tax withheld 4091.22	
		10 Wages, tips, other compensation 31161.02	
		11 Social security tax withheld 1931.98	
		12 Social security wages 31161.02	
		13 Social security tips	
		14 Medicare wages and tips 31161.02	

19 Employee's name, address, and ZIP code T L ORNDORFF RO 3 BOX 406E HANOVER PA 17331 018-1-0029-02900-42449-1		15 Medicare tax withheld 451.83		16 Nonqualified plans	
		17 See instrs. for Box 17 C— 87.92		18 Other	
20		21		22 Dependent care benefits 00	
23 Benefits included in Box 10 00		24 State income tax 913.51		25 State wages, tips, etc. 31073.10	
26 Name of state PA		27 Local income tax 310.69		28 Local wages, tips, etc.	
29 Name of locality YORK					

Copy 5 To Be Filed With Employee's
FEDERAL Tax Return

Department of the Treasury
Internal Revenue Service

Form W-2 Wage and Tax Statement 1992

ORDER ALLOWING CERTIORARI

Filed September 29, 1997

[Caption Omitted in Printing]

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply.

September 29, 1997



Supreme Court, U. S.

FILED

NOV 13 1997

CLERK

No. 96-1925

In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated
LOCAL UNION 786,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED JUNE 2, 1997
CERTIORARI GRANTED SEPTEMBER 29, 1997

6088

QUESTION PRESENTED

Section 302(a) of the Labor Management Relations Act forbids an employer to pay or agree to pay the union officials who represent its employees. Section 302(c)(1) exempts payments to an official who is a current or former employee if the payments are made "by reason of" the official's past or present "service as an *employee*." Sitting *en banc* a divided Third Circuit overruled its own precedent and became the first court of appeals to accept the contention that this exemption extends to the provision of current, full-time wages to full-time union officials who no longer perform any work for the employer. According to the majority, the exemption applies simply if union officials were formerly employed by the payor and if the payments were provided for in a collectively bargained agreement.

This case thus presents the following question:

- Whether section 302(c)(1) permits an employer to pay or agree to pay the current wages of full-time union officials who are former employees of the employer but who no longer perform any work for the employer.

RULE 29.6 STATEMENT

Caterpillar Inc., a corporation, has no parent companies but has the following non-wholly owned subsidiaries:

- Advanced Filtration Systems, Inc.
- AO NOVOTRUCK
- Aquila Mining Systems Ltd.
- Caterpillar Elphinstone Pty. Ltd.
- Bio-energy Partners
- Cyclean, Inc.
- F.G. Wilson, L.L.C.
- Lexington Real Estate Holding Corp.
- Peoria Medical Research Corp.
- Rapisarda Industries S.r.L.
- RR-1 Limited Partnership
- UNOC Equipment and Supply, L.L.C.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. EMPLOYER PAYMENTS TO FULL-TIME UNION REPRESENTATIVES CONTRA- VENE THE PLAIN LANGUAGE AND PUR- POSES OF SECTION 302	13
A. The General Ban of Section 302 Was En- acted to Protect Labor-Management Rela- tions From the Corrosive Effects that Payments to Full-Time Union Represen- tatives Present	13
B. Section 302(c)(1) Allows Payments Only if Owed in Spite of, Not Because of, Ser- vice as a Union Representative	20

II.	INCLUSION OF AGREEMENT TO PAY WAGES OF FULL-TIME UNION OFFICERS IN A COLLECTIVE BARGAINING AGREEMENT "APPROVED BY THE RANK AND FILE" DOES NOT EXEMPT SUCH PAYMENTS FROM THE PROHIBITION OF SECTION 302	26
A.	The Contention that "Service as an Employee" is Defined by the Terms of a Labor Contract is Circular and Contradicts the Text and Legislative History of Section 302	27
B.	The Contention That Payments to Union Officials Are Lawful if Funded by Wages Diverted from Employees Is Self-Refuting	29
C.	The Contention that Contract Ratification Is an Adequate Safeguard Contradicts the Reality and Congressional Opinion of Collective Bargaining	34
III.	PAYING THE WAGES OF FULL-TIME UNION OFFICIALS GOES WELL BEYOND THE LIMITED "NO DOCKING" PRACTICES ARGUABLY PERMITTED UNDER SECTION 302	39
A.	The Language and Legislative History of Sections 8(a)(2) and 302 Support Limited "No Docking" of "Time and Pay" of Employee But Not Paying Wages for Full-Time Union Agents	39

B.	There Are Substantial Legal, Practical and Economic Distinctions Between Limited "No Docking" of Current Employees Who, on Occasion, Perform Union Representational Services as Needed for Fellow Employees and Paying the Wages of Former Employees/Full-Time Union Officials Who Perform No Service for the Employer	45
	CONCLUSION	50

TABLE OF AUTHORITIES

CASES:	Page
<i>Ackley v. Western Conf. of Teamsters</i> , 958 F.2d 1463 (CA9 1992)	36
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959) . . .	14, 15, 16
<i>BASF Wyandotte Corp. v. Local 227</i> , <i>Int'l Chem. Workers Union</i> , 791 F.2d 1046 (CA2 1986)	21, 22, 24, 43, 44, 45
<i>Bulova Watch Co. v. United States</i> , 365 U.S. 753 (1961)	40
<i>Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.</i> , 799 F.2d 1098 (CA6 1986)	36
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988)	33
<i>Community Nutrition Institute v. Block</i> , 749 F.2d 50 (CA5 1984)	36
<i>Costello v. Lipsitz</i> , 547 F.2d 1267 (CA5), <i>cert. denied</i> , 434 U.S. 829 (1977)	19
<i>Electromation, Inc.</i> , 309 NLRB 990 (1992), <i>enf'd</i> , 35 F.3d 1148 (CA7 1994)	17
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984)	33
<i>Employees' Independent Union v. Wyman Gordon Co.</i> , 314 F.Supp. 458 (N.D. Ill. 1970) . .	42, 43
<i>Fulk v. United Transportation Union</i> , 81 F.3d 733 (CA7 1996)	36
<i>General Building Contractors Ass'n, Inc. v. Pennsylvania</i> , 458 U.S. 375 (1982)	16, 17
<i>Ginsberg & Son, Inc. v. Popkin</i> , 285 U.S. 204 (1932)	40

<i>Jett v. Dallas Indep. School Dist.</i> , 491 U.S. 701 (1989)	40
<i>Knapp v. Schweitzer</i> , 357 U.S. 371 (1958)	15
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	17
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	40
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (CA5 1986)	22, 24, 44
<i>NLRB v. Cabot Carbon Co.</i> , 360 U.S. 203 (1959)	17
<i>NLRB v. Insurance Agents</i> , 361 U.S. 477 (1960)	16
<i>NLRB v. Hendricks County Rural Elec. Membership Corp.</i> , 454 U.S. 170 (1981)	17
<i>NLRB v. Newport News Shipbuilding & Dry Dock Co.</i> , 308 U.S. 241 (1939)	17
<i>NLRB v. Town & Country Electric, Inc.</i> , 516 U.S. 85, 116 S. Ct. 450 (1995)	44, 48, 49
<i>Radzanower v. Touche Ross & Co.</i> , 426 U.S. 148 (1976)	40
<i>Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.</i> , 634 F.2d 258 (CA6 1981)	47
<i>Retail Clerks Int'l Ass'n, Local 1625 v. Schermehorn</i> , 375 U.S. 96 (1963)	33
<i>Talbot v. Robert Matthews Distributing Co.</i> , 961 F.2d 654 (CA7 1992)	36
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council</i> , 785 F.2d 101 (CA3), <i>cert. denied</i> , 479 U.S. 932 (1986)	9, 14, 15, 17, 22, 23, 25, 37
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (CA7) <i>cert. denied</i> , 493 U.S. 994 (1989)	22, 24

<i>United States v. Kaye</i> , 556 F.2d 855 (CA7), cert. denied, 434 U.S. 921 (1977)	47
<i>United States v. Phillips</i> , 19 F.3d 1565 (CA11 1994), cert. denied, 514 U.S. 1003 and cert. denied sub nom. <i>USX Corp. v. United</i> <i>States</i> , 514 U.S. 1003 (1995)	19, 21, 22, 23, 44
<i>United States v. Ryan</i> , 350 U.S. 299 (1956)	14, 15, 16, 26
<i>United States v. Ryan</i> , 232 F.2d 481 (CA2 1956)	15

STATUTES:

28 U.S.C. § 1254(1)	1
29 U.S.C. § 157	32
29 U.S.C. § 158(a)(1)	7
29 U.S.C. § 158(a)(2)	12, 17, 39, 40, 42, 43, 44, 45
29 U.S.C. § 158(a)(3)	7, 8
29 U.S.C. § 158(a)(5)	7, 8
29 U.S.C. § 158(b)(2)	7, 8
29 U.S.C. § 164(b)	32
29 U.S.C. § 186	passim
29 U.S.C. § 186(a)	1, 13, 14, 16, 20, 26, 38
29 U.S.C. § 186(a)(1)	14, 27, 28
29 U.S.C. § 186(b)	1, 13, 16, 20
29 U.S.C. § 186(b)(1)	14
29 U.S.C. § 186(c)	28
29 U.S.C. § 186(c)(1)	passim
29 U.S.C. § 186(c)(2)	28

29 U.S.C. § 816(c)(3)	28
29 U.S.C. § 186(c)(4)	18
29 U.S.C. § 186(c)(5)	17, 23, 24, 28
29 U.S.C. § 186(e)	8
Pub. L. No. 101, 61 Stat. 136 (1947)	16
Tenn. Code Ann. § 50-1-201 (1995)	32

MISCELLANEOUS:

NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1985)	18, 25, 31, 32, 34, 35, 43, 44
NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1985)	41, 42
<i>Hearings Before the Senate Comm. on Education and Labor on S. 1958, Part 3, 74th Cong. (1935)</i>	41, 42
<i>Labor Disputes Act, Hearings Before the House Comm. on Labor on H.R. 6288, 74th Cong. (1935)</i>	41
H. REP. NO. 245, 80th Cong. (1947)	43
S. REP. NO. 105, 80th Cong. (1947)	18, 31, 44
S. REP. NO. 105, Pt. 2, 80th Cong. (1947)	32
S. REP. NO. 573, 74th Cong. (1935)	42
H. CONF. REP. NO. 510, 80th Cong. (1947)	44
STAFF OF SENATE COMM. ON EDUCATION AND LABOR, 74TH CONG., MEMORANDUM COMPARING S. 1958 WITH THE BILL REPORTED AS A SUBSTITUTE FOR S. 2926 (Comm. Print 1935)	42

H.R. 4908, 79th Cong. (1946)	16
92 CONG. REC. (1946)	16, 18, 19, 20, 22, 25, 28, 31
93 CONG. REC. (daily ed. 1947)	25, 32, 34, 35
Felix Frankfurter, <i>Sixth Annual Benjamin Cardozo</i> <i>Lecture: Some Reflections on the Reading of</i> <i>Statutes</i> , THE RECORD OF THE ASSOCIATION OF THE BAR OF NEW YORK, No. 6 (1947)	46
Black's Law Dictionary (6th ed. 1990)	48, 49

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, sitting *en banc*, Pet. App. at 1a, are reported at 107 F.3d 1052. The *sua sponte* order of the court of appeals setting this case for rehearing *en banc*, Pet. App. at 45a, is unreported. The opinion of the district court, Pet. App. at 47a, is reported at 909 F. Supp. 254.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on March 4, 1997. Pet. App. at 44a. Caterpillar invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) in a Petition filed on June 2, 1997. This Court granted the Petition on September 29, 1997.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. § 186 (1994 & Supp. I 1995), is reproduced in the Appendix to the Petition. Pet. App. at 64a.

STATEMENT OF THE CASE

This case concerns the UAW's demand that Caterpillar continue the payment of wages to former employees who have left the Company's employ to become full-time union officials. In that capacity, they perform no work for Caterpillar but exclusively represent the UAW and Caterpillar workers. In this declaratory judgment action, Caterpillar contends that these wage payments violate section 302(a) and (b) of the Labor Management Relations Act, 1947 [hereinafter LMRA], 29 U.S.C. § 186(a), (b) (1994 & Supp. I 1995). A divided Third Circuit, sitting *en banc*, overruled its own precedent and upheld the legality of the payments.

1. *The UAW's Historical Representation of Caterpillar Employees.* For many years, the UAW has represented Caterpillar's production and maintenance employees at a number of manufacturing and related facilities around the United States. Appendix filed in the Court of Appeals [hereinafter "Cir. App."] at 44. Caterpillar and the UAW have been parties to a series of contracts known as the "Central Agreement" and local supplements covering facilities in Illinois, Tennessee, Pennsylvania, and Colorado. *Id.* at 37, 41. The York, Pennsylvania facility, regarding which this particular suit arose, has been covered by the Central Agreement since 1954. *Id.* at 41.

Under the Central Agreement, employees may present grievances to their supervisors during the work day. Joint Appendix [hereinafter "J.A."] at 19. "Stewards" and "plant grievance committeemen," who are active employees of Caterpillar and who also represent their fellow employees as needed in the presentation of grievances, are called upon during the work day to meet with the grievant and discuss the grievance with management. J.A. 43-44; Cir. App. at 166, 177-78. The regular wages of the employee-representative are not docked for time spent in the grievance procedure, and he may take time to "discuss the grievance" with management "without loss in pay for regularly scheduled hours." J.A. at 44.

2. *The Role of Full-Time UAW Officials.* In addition to full-time employees who serve as union representatives on an "as needed" basis, other UAW officials are also involved in the grievance procedure. For example, at York the Central Agreement recognizes a "Chairman of the Grievance Committee," an "Alternate Committeeman" and an "International Representative." J.A. at 5-6. The Chairman and his alternate, *inter alia*, represent the Union in the final "steps" of the grievance procedure, and consult with

the International on the disposition of grievances. J.A. at 44-47; Cir. App. at 609, 637. The Chairman also serves on the Local Bargaining Committee and the Central Bargaining Committee. Cir. App. at 183-84, 629. At other facilities, the Central Agreement recognizes a number of "full-time Committeemen," a "Grievance Committee Chairman," a "Bargaining Committee Chairman" and a "President of the Local." J.A. at 3-10.

All of these officials are full-time representatives in the employ of the UAW.¹ J.A. at 13-18; Cir. App. at 166-67. International Representatives are appointed by the International and may be on leave of absence from Caterpillar or elsewhere. J.A. at 3-18, 36; Cir. App. at 168. Other full-time officials are elected by the members. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7.

The full-time Committeemen perform no work for Caterpillar. Cir. App. at 173-74, 176-79, 183-90, 617-21. Instead, they perform functions exclusively for the Union. *Id.* They take direction only from the Union and perform their duties exclusively for the benefit of the Union and its members. *Id.* Caterpillar exercises no control over the manner or means by which they perform their duties. *Id.* The Union, not Caterpillar, selects them as agents, determines their qualifications, assigns their duties, evaluates their performance, and determines their tenure. J.A. at 3-10; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7. Committeemen may perform their duties in plant-based Union offices or in Union offices away

¹ As discussed *infra*, every court and administrative body that to date has considered the issue, including the Third Circuit, has agreed that these full-time Committeemen are employees of the Union and are not employees of Caterpillar.

from the plants. J.A. at 13-18; Cir. App. at 183-84, 188. For example, the York full-time Committeemen's offices were located in the Local Union hall and on average the incumbent Chairman spent one day per week performing representational functions inside the plant. *Id.*

3. *The UAW Demand that Caterpillar Pay Wages and Benefits to Full-Time Union Officials.* In 1973, the UAW demanded that Caterpillar pay for certain of these full-time Union representatives. Cir. App. at 475-76, 503-04, 520, 539. After a strike over this and other issues, Caterpillar agreed to provide wages and benefits for the full-time Chairmen of the Grievance Committees, including York's. Cir. App. at 477, 542, 544. In 1979, Caterpillar agreed to the UAW's demand to provide wages and benefits to other full-time Committeemen and York's full-time Alternate Committeeman, currently a total of 29 UAW officials (hereinafter "full-time Committeemen"). Cir. App. at 167; J.A. at 3-10.

Under the terms of the most recent Central Agreement, full-time Committeemen "shall be considered to be on leave of absence" and "will be paid by the Company for his regular shift hours . . . that employees in his jurisdiction are scheduled to work."² J.A. at 14, 16-17. In addition, any full-time Committeemen who "spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay." J.A. at 14, 17. Full-time Committeemen also were granted "the same coverage as though he was actively at work" for the purposes of the Non-

² The Company, however, is not required to pay for time spent in "negotiations," "vacations," "attendance at meetings or conventions not held in the Local Union office," or "any activity not directly related to the functions of his office." J.A. at 14, 17.

Contributory Pension, Group Insurance, and Supplemental Unemployment Benefit plans. J.A. at 15-17. As of 1991, Caterpillar payments to these full-time Union representatives had reached approximately \$1.8 million per year. Cir. App. at 167.

Such paid leave arrangements can continue indefinitely. Cir. App. at 168. Indeed, several Committeemen have spent more years on paid "leave of absence" than as active employees and some have retired from Caterpillar while on paid "leave." *Id.* Such full-time leaves of absence with pay are without precedent for rank-and-file Caterpillar employees. Thus, while short absences by active employees to go on holiday, attend funerals, testify at trials, perform one's "weekend warrior" military reserve duty, or spend a "bonus day off" earned by good attendance are paid,³ employees who go on leave of absence as provided for under Article 14 for "military leave,"⁴ "disability leave," "Peace Corps leave," "maternity leave," or "government or union leave" are not

³ Section 15.1 provides for a "paid absence allowance" (12 to 50 hours per year based upon length of service or seniority date); Section 15.2 addresses holiday pay (11 specified days per year); Section 15.3 deals with employees summoned to jury duty or subpoenaed as witnesses; Section 15.4 deals with temporary military service (such as two-week National Guard camp or emergency call up); 15.5 deals with bereavement pay (up to 24 consecutive hours of work over 4 defined days per incident). Indeed 15.6 grants "Attendance Bonus" credits by which an employee can earn additional paid time off by virtue of his regular good attendance. J.A. at 38-42; UAW's Statement of Material Facts to Which Defendants Contend There is No Genuine Issue to be Tried, Exh. A (Articles 15.1, 15.2, 15.6).

⁴ Thus, for example, the labor contract itself recognizes the distinction between a *leave of absence* for long-term military service which is *unpaid*, see Section 14.7, and a short-term absence for temporary military service under Section 15.4 for which the employee is not docked. J.A. at 35-36, 40-41.

compensated. Thereunder, "[a]ll leaves of absence shall be without pay, except as expressly provided elsewhere in this Agreement . . ." J.A. at 35. Consequently, none of these types of leaves, including analogous leaves to serve in public office and even Union leaves for rank-and-file members, except leaves for these full-time Committeemen, are paid.⁵ J.A. at 36-37.

4. *The 1991-92 Negotiations.* In 1991, the UAW gave notice that it proposed to renegotiate the Central Agreement. Complaint, ¶ 14; Amended Answers, ¶ 14. Among its proposed changes, it demanded that the pay for certain full-time Committeemen be increased to 54 hours per week, plus shift premium at the highest labor grade rate, regardless of prior classification. Cir. App. at 167-68. After Caterpillar rejected this and other demands, the Union terminated the Central Agreement and undertook a strike. Complaint, ¶ 14; Amended Answers, ¶ 14; Cir. App. at 140-41. The strike was "recessed" in April 1992 without conclusion of a new agreement. *Id.* at 141.

In October, 1992, still without a negotiated agreement, Caterpillar advised the Union that it would not continue to

⁵ The disability and pregnancy leave provisions of Article 14 do provide for the possibility of "benefit payments" but only insurance payments under the Group Insurance Plan. J.A. at 34. Disability leave is available for the period of actual disability, in no event exceeding two years. *Id.* at 33-34. Whether any insurance benefit payments are received during the disability leave is a function of the Group Insurance Plan. *Id.* Their respective eligibility provisions are *not* coextensive. An employee eligible for a disability leave may nevertheless not qualify for disability payments under the insurance plan. *Id.* While the period of pregnancy is treated as a disability and, thus is eligible for insurance payments, maternity (childcare) leave is also unpaid. *Id.* at 33-35.

pay full-time union officials until a new agreement, lawfully providing for such payments, was negotiated.⁶ J.A. at 48-53.

5. *The UAW's Unfair Labor Practice Charges and Caterpillar's Declaratory Judgment Action.* In response, the UAW filed charges on November 17, 1992 with the NLRB, alleging violations of sections 8(a)(1), (3) and (5) of the Act. Cir. App. at 124; UAW's Reply to Caterpillar's Opposition to Motion to Stay Proceedings, Exh. 1. The General Counsel issued a limited complaint on December 30, 1992. Cir. App. at 123-34.

On December 22, 1992, Caterpillar filed this declaratory judgment suit in the U.S. District Court for the Middle District of Pennsylvania and advised the NLRB that it was reserving to the federal courts the issue of the legality of the payments under section 302. Cir. App. at 144-45; Caterpillar's Brief in Opp. to NLRB's Motion to Intervene, Exh. A, ¶ 14.

In the NLRB proceeding, the Board's General Counsel and the UAW contended Caterpillar had failed and refused to bargain with the Union before it ceased providing wages and benefits for the Committeemen in violation of section 8(a)(5) of the NLRA. Cir. App. at 123-34, 145. Caterpillar denied that it had failed to meet any obligations under section 8(a)(5) to bargain over the suspension of the wage subsidy but also defended on the ground, *inter alia*, that continued provision of wages and benefits for the Committeemen constituted unlawful discrimination against employees who chose to refrain from Union activities in violation of sections 8(a)(3) and 8(b)(2) of the NLRA. NLRB's Reply

⁶ Caterpillar did not discontinue its no docking of the pay of regular active employees serving as stewards and part-time committeemen. J.A. at 49.

to Caterpillar's Opp. to Motion to Intervene, Attachment A at pp. 18-19; UAW's Opp. to Caterpillar's Motion for Reconsideration, Attachment 2 at pp. 141-45. As it had previously advised, Caterpillar expressly reserved the section 302 issue for resolution by the federal court as the forum designated to hear such matters under section 302(e). *Id.*; Cir. App. at 144-45.

6. *The Findings of the NLRB's Administrative Law Judge.* On January 3, 1995, the NLRB administrative law judge issued a Decision and Recommended Order dismissing the alleged unfair labor practice complaints. Pet. App. at 139. Likening the Committeemen to assistant business agents in the construction and retail food industries, the ALJ found the Committeemen performed no productive work for Caterpillar in exchange for the payments and Caterpillar had no control over the manner or means by which they performed their Union duties. Cir. App. at 141-43. They worked for the Union, were responsible only to the Union for their work product and answered only to the Union, and it was the Union, not Caterpillar, which determined their tenure. *Id.* Given those facts, as well as other facts present in that case, the ALJ found the payments violated sections 8(a)(3) and 8(b)(2) of the NLRA and, accordingly, a refusal to pay them could not constitute a violation of section 8(a)(5). *Id.* at 146-47. The ALJ also observed, but found it "unnecessary" to rule, that the payments "raise[d] a serious question under Section 302." *Id.* at 145.

7. *The District Court's Ruling.* After Caterpillar brought this action, the NLRB moved to intervene and to stay the proceedings pending resolution of its unfair labor practice complaints against Caterpillar. Cir. App. at 101. The Union also moved for a stay. *Id.* The District Court denied the NLRB's motions but granted the Union's. Cir. App. at 111. Following the issuance of the ALJ's ruling, which remains

pending before the Board on exceptions, the District Court lifted its stay and both parties moved for summary judgment. Pet App. at 51a; Cir. App. at 569.

The District Court granted summary judgment for Caterpillar. Pet. App. at 63a. The court found that the Committeemen were not current employees of the Company because Caterpillar did not exercise sufficient control over them and that they performed their duties for the direct benefit of the Union. *Id.* at 56a-60a. The District Court applied the plain language of section 302, as previously interpreted and construed by the Third Circuit in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3), *cert. denied*, 479 U.S. 932 (1986), and held the payments violated section 302. Pet. App. at 60a-62a.

8. *The Third Circuit's Ruling.* On appeal, the Third Circuit, hearing the case *sua sponte en banc*, overruled *Trailways* and reversed the District Court. It held payments of wages to full-time Union Committeemen lawful as "expanded 'no-docking' provisions" where they are "contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote." Pet. App. at 1a-12a. Judges Mansmann, Greenberg, and Alito dissented. Judge Mansmann declared that

[i]n suggesting that 'innocuous, bargained-for, and fully disclosed payment' . . . should be lawful, the majority has placed its own policy objectives above plain language The plain language . . . is supported by the legislative history and purpose of the exception and the majority's conclusion is at odds with important federal policy.

Id. at 12a-30a.

SUMMARY OF ARGUMENT

Consider the following scenario: During collective bargaining—which undoubtedly no longer occurs in the proverbial “smoke-filled room”—union leaders offer to reduce their demand for a pay raise for workers to a level the employer has signaled it may be prepared to accept. Concurrently, the leaders continue to propose that the employer agree to pay the wages of full-time union officers who leave the employer to become union representatives—a demand so far resisted by management. No one explicitly mentions a *quid pro quo*. The parties quickly reach an accord on these and numerous other proposed terms. At the union hall, the agreement is approved by a voting majority of the union members in attendance. Can the parties lawfully make that deal?

A majority of the Third Circuit reversed its existing precedent to embrace such transactions because, in its view, such payments are “innocuous,” “bargained for,” and “fully disclosed.” Pet. App. at 8a. Caterpillar respectfully contends that, in attempting to engraft such non-textual criteria onto the explicit text of section 302, the court placed its own policy objectives above those of Congress.

The plain language of section 302 makes it unlawful to “agree to pay” money or anything of value to a union representative. Section 302(c)(1), which allows payments to an employee or former employee, “as compensation for” or “by reason of” *“his service as an employee,”* only permits the employer to pay what is due to the employee *in spite of, not because of*, his position as a union official. It does not allow the employer and the union to “cut a deal,” memorialized in a collective bargaining agreement or on the back of an envelope, for the employer to pay the wages of the union officials representing his employees, regardless of whether the union official once worked for the payor.

The legislative history of section 302 confirms that Congress only sought to exempt money due to the employee or former employee “on account of wages actually earned by him.” In so doing, Congress, far from being only concerned with “noxious” acts of actual bribery or extortion, also acted prophylactically to avoid any potential conflicts of interest for union representatives and to maintain both labor’s *financial independence from management and financial dependence upon the dues of its members*.

That such payments were agreed to in the “give and take” of the collective bargaining process is only cause for *heightened* anxiety. Congress was not merely worried about “back-door deals.” On the contrary, Congress was expressly concerned with agreements reached *in* collective bargaining which *would* provide for indirect funding of unions through “diversions” to union coffers of wages earned by employees.

To argue, as does organized labor, that the wages of these union officials can be considered a “fringe benefit” earned by *their* past employment is sophistry. To contend that the parties may transform these payments for *current service as a union agent* into payments “by reason of” past “*service as an employee*” by simply declaring so in an agreement renders section 302(c)(1) a nullity. In reality, it is a union subsidy funded by all other *employees’* current service and, as the Third Circuit majority itself observed, *employees’* reduced wages.

As to the significance of “full disclosure,” whatever that may mean, it is an illusion which is never required in principle, let alone found, in the hurly-burly of collective bargaining. Moreover, corrosive practices risking the growth of conflicting interests, undue influence, and the loss of a proper balance of financial independence from management and dependence upon members are no less risky because members approve of them, *even* with their

vision clear, however shortsighted. Congress made these judgments; it did not cede them to the parties or union members.

Organized labor's attempt to dress up full-time wages to full-time union officials as mere "expanded no-docking policies" is a disguise. There are real and significant legal, practical, and economic differences between "not docking" a regular worker, who during the work day confers with the employer over the terms of employment on his own behalf or on behalf of a fellow worker, and a full-time union agent no longer employed by the employer.

The proviso to section 8(a)(2) of the NLRA does permit "employees" to "confer with [the employer] during working hours without loss of time or pay." 29 U.S.C. §158(a)(2). While the explicit requirement of section 302(c)(1) that any payment be for "service as an employee" may be read to permit this narrow practice, it warrants no further allowance. It most certainly does not require that section 302 be rendered nugatory by reading its substantive requirement that payments only be for "service as an employee" out of the statute.

Full-time union agents are no longer employees of the employer. Perhaps even more importantly, they are now full-time employees of an organization supposed to be separate and independent of the employer. On a practical level, an appreciation of the distinction between regular-worker representatives and full-time union officers must include recognition that in the ordinary course, the latter have substantially more authority and stand in oversight of the former. While this difference may or may not be a matter of degree, most serious legal distinctions do involve matters of degree.

Finally, on the economic level, the regular worker may reasonably be said to earn by his own labors the accom-

modation that he not be docked time or pay to meet with his employer. But as the Third Circuit majority itself recognized, the full-time paid leave for full-time union agents is in reality earned not by his labor but is funded by the reduced wages of every rank-and-file worker, member and non-member. As such, the former case is a *no-docking* policy, the latter case a massive *wage-docking* scheme.

ARGUMENT

I. EMPLOYER PAYMENTS TO FULL-TIME UNION REPRESENTATIVES CONTRAVENE THE PLAIN LANGUAGE AND PURPOSES OF SECTION 302

The text and legislative history of section 302 plainly show that it was designed to strictly limit the circumstances under which money could pass from employers to unions, their agents, or trust funds under their control. Congress generally banned the transfer of anything of value from management to labor. With illegality as the default rule, Congress then authorized a few narrow types of employer payments by expressly exempting them from the general ban. This prohibit-and-exempt approach allowed Congress to police labor-management relations by specifying with precision which employer payments it would permit and under what conditions. The payments at issue here do not come within any of the statutory exceptions. On the contrary, they represent some of the very evils Congress sought to address.

A. The General Ban of Section 302 Was Enacted to Protect Labor-Management Relations From the Corrosive Effects that Payments to Full-Time Union Representatives Present

The general ban on employer payments, contained in section 302(a) and (b) of the LMRA, unambiguously prohib-

its an employer from paying the wages of full-time union representatives. Section 302(a)(1) forbids an employer

to pay . . . or agree to pay . . . any money or other thing of value . . . to any representative of any of his employees.

29 U.S.C. § 186(a)(1) (1994). Section 302(b)(1) establishes a "reciprocal" ban, *Arroyo v. United States*, 359 U.S. 419, 423 (1959), applicable to union representatives who "receive[] or accept, or agree to receive or accept," payments forbidden by subsection (a). 29 U.S.C. § 186(b)(1) (1994). This Court held long ago that the "broad prohibition" of section 302 bans employer payments to individuals, such as grievance representatives, "who represent employees in their relations with the employers." *United States v. Ryan*, 350 U.S. 299, 305, 307 (1956).

Although no one has disputed that the payments at issue here come within this broad prohibition, the Third Circuit majority failed to acknowledge the full panoply of purposes served by the ban. Conceding that "[o]n the face of § 302(a)" the payments "would appear to be unlawful," Pet. App. at 5a, the majority nevertheless decided that because the payments were, in its view, "innocuous, bargained-for and fully disclosed," Pet. App. at 8a, they did not present the kind of "bribery, extortion," or "other corrupt practices conducted in secret" that Congress sought to prevent when it enacted section 302. Pet. App. at 12a. This myopic view of section 302 distorted the majority's interpretation of it.

Even if the majority thought the payments were "innocuous" in comparison to bribery and extortion, it erred in concluding that they did not implicate concerns underlying section 302. The Third Circuit itself had previously observed in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3), *cert. denied*, 479 U.S. 932

(1986), that although payments made to union representatives who are former employees

may not at first blush be the kinds of payments thought to lead to corruption of union officials, *the potential for such corruption, or at least the appearance of it, nevertheless remains.*

Id. at 108 (emphasis added).⁷

Indeed, Congress created a broad, *malum prohibitum* restriction, "which outlaws all payments, with stated exceptions, between employer and representative." *Ryan*, 350 U.S. at 305; *see also* Pet. App. at 18a (Mansmann, J., dissenting) ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management."). If section 302 were limited to bribery, extortion, and corruption, it would do little more than duplicate state criminal laws, a result this Court has expressly rejected. *Arroyo*, 359 U.S. at 425; *cf., e.g., Knapp v. Schweitzer*, 357 U.S. 371, 372 (1958) (involving state grand jury investigation of bribery of labor representatives, conspiracy, and extortion). As the prohibition itself suggests, then, the concerns of Congress were broader.

⁷ Similarly, the Second Circuit has reasoned that section 302 "covers gifts, however trifling and *innocuous*," because

Congress may well have wished to put a stop to the practice, even on occasions inconsiderable and harmless in themselves, rather than to make verbal distinctions that would be troublesome in application.

United States v. Ryan, 232 F.2d 481, 483 (CA2 1956) (emphasis added), *on remand from* 350 U.S. 299.

The legislative history of section 302⁸ confirms that Congress intended to erect a firm financial barrier preventing an employer from making payments to a union or its agents. See, e.g., 92 CONG. REC. 4,891 (1946) ("[T]he [provision] prohibits payments . . . to labor representatives and labor organizations, but in no manner does it prohibit . . . payment[s] . . . to employees directly." (statement of Senator Byrd)).

In addition to preventing bribery, extortion, and secret deals, this financial barrier serves at least three other functions. First, it helps to preserve the independence of labor from management, a fundamental tenet of American labor policy. As this Court has observed,

[t]he entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest."

General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 394 (1982) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)).

Federal labor law seeks to "ensure the integrity" of the collective bargaining system "by preventing both management and labor's representatives from being coerced in the

⁸ This Court has recognized the legislative history of the 1946 Case bill, H.R. 4908, 79th Cong. (1946), as a legitimate source in interpreting section 302 because a provision added to the bill by the so-called Byrd amendment contained very similar language. See *Arroyo*, 359 U.S. at 425-26 & n.6; *Ryan*, 350 U.S. at 304-05. In fact, the only difference between the Byrd amendment and section 302(a), (b), and (c)(1), as originally enacted, was the phrasing of the interstate commerce nexus. Compare H.R. 4908, § 8(a)-(c)(1), reprinted in 92 CONG. REC. 5,521 (1946) with LMRA § 302(a)(c)(1), Pub. L. No. 101, 61 Stat. 136, 157 (1947).

performance of their official duties," including arrangements that give an employer "leverage over the manner in which the [labor] official performs his union duties." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704-05 (1983); accord *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part) (calling "the dividing line between management and labor . . . fundamental to the industrial philosophy of the labor laws in this country"). Section 8(a)(2) of the National Labor Relations Act, for example, makes it an unfair labor practice for an employer to "dominate," "interfere with," or "contribute financial support to" unions. 29 U.S.C. § 158(a)(2) (1994). This Court has recognized section 302 as another mechanism that "prohibits employers from compromising the independence of labor unions." *General Building Contractors*, 458 U.S. at 394.

Labor-management independence has been a recurring theme in federal labor law, from early resistance to "company unions," see, e.g., *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939), to recent controversies over joint labor-management committees, see, e.g., *Electromation, Inc.*, 309 NLRB 990 (1992), *enf'd*, 35 F.3d 1148 (CA7 1994); cf. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). The Third Circuit itself has noted the "inherently adversarial relationship" between labor and management. *Trailways*, 785 F.2d at 108 (construing section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (1994)).

Not only does the financial barrier help to prevent employer control of unions, it also helps to ensure that control of the purse strings of labor organizations remains firmly in the hands of the union members themselves. Financial dependence upon those represented by unions, as well as financial independence from management, must be preserved. A key concern of the proponents of section 302 was

the *diversion* to unions or their agents of money that employers might otherwise have paid to workers as wages. See S. REP. NO. 105, 80th Cong. at 52 (1947) (identifying purpose of section 302 as restricting authority of union leaders to "divert" employee wages to unions (supplemental views)), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 458 (1985).⁹ As a result, any money flowing to a union or its agents must pass through the hands of rank-and-file workers in the form of wages for their service as employees.

Suggesting that a union should fund its activities from membership dues, Senator Taft recognized why union leaders might prefer a direct employer subsidy:

[The coal miners] might say to the operators, "Add 7 percent to the pay roll of every man, and agree to check off 7 percent into a fund." . . . Of course, . . . the employees . . . would know that the union was taking 7 percent of their pay away from them: therefore, the union leaders do not want it.

92 CONG. REC. 5,339-40 (1946). Section 302 counteracts the tendency of unions to prefer employer subsidies by substituting a dues approach in part because it keeps union organizations financially dependent on their rank-and-file members.¹⁰ See LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4)

⁹ See also 92 CONG. REC. 5428 (1946) ("It prohibits taking money that has been earned by the employees themselves and paying it to a union." (statement of Senator Taft)).

¹⁰ Employers too are far from without self-interested motive. As was the case here, paying union officer salaries and withholding pay during periods of hard bargaining can be used as leverage. This dispute arose when Caterpillar withheld union Committeemen pay to gain leverage in the labor negotiations. Cir. App. at 135-36, 168-69.

(1994) (requiring individual written and revocable authorization of employee for union dues check-off).¹¹

Finally, the financial barrier that section 302 erects was designed in part to keep union representatives free of even potentially conflicting interests. *United States v. Phillips*, 19 F.3d 1565, 1574 (CA11 1994), cert. denied, 514 U.S. 1003, and cert. denied sub nom. *USX Corp. v. United States*, 514 U.S. 1003 (1995); see *Costello v. Lipsitz*, 547 F.2d 1267, 1273 (CA5) (calling section 302 "prophylactic" measure), cert. denied, 434 U.S. 829 (1977).¹² The proponents of section 302 repeatedly made this point. Senator Taft, for example, asserted that

once we permit an agent to obtain money for his own use, or for any purpose, it is affirmatively a dubious practice, an immoral practice, and unless it is used for purposes which are properly defined, it should not be permitted.

92 CONG. REC. 5,466 (1946). Likewise, Senator Hatch compared employer payments to union representatives with gifts to an attorney from an adverse party. 92 CONG. REC. 5,428 (1946).¹³

¹¹ Senator Ball also expressed concern that union leaders might "perpetuate their power over the employees" and suppress dissent among members by selectively withholding benefits from a union-controlled welfare fund made up of employer payments diverted from employee wages. 92 CONG. REC. 5,345-46 (1946) (wondering whether coal miner who publicly disagreed with John L. Lewis would ever receive benefits from union welfare fund).

¹² As Judge Mansmann correctly noted in dissent below, "[t]he payments at issue . . . create a conflict of interest for union negotiators who may agree to reduced benefits for the employees in exchange for financial support for the union." Pet. App. at 18a.

¹³ Senator Hoey also warned that such payments would "destroy[]" the "effectiveness" of union representatives. 92 CONG. (continued...)

The payments at issue here threaten these interests. They potentially undermine the independence of labor by feeding the Union an annual subsidy of nearly \$2 million, Cir. App. at 167, and by that amount lessen the Union's dependence on its members, whose control is weakened as a result. The Union's demand that these payments be raised to 54 hours per week at the highest employee salary grade, *id.* at 167-68, increased the problem of wage diversion. Moreover, the Union's demand that payments be continued even after the contract expired—when members could cease their direct financial support by withdrawing from the Union—exacerbated the erosion of the members' right to cease their financial support. Cir. App. at 123-34.

B. Section 302(c)(1) Allows Payments Only if Owed in Spite of, Not Because of, Service as a Union Representative

The clear prohibition of section 302(a) and (b) notwithstanding, unions have been pushing the lower courts for over a decade to authorize these arrangements, and the Third Circuit majority has at long last given them *carte blanche*. The vehicle chosen to carry this weighty uphill load, however, lacks the statutory horsepower.

Section 302(c)(1), on its face, simply accounts for the reality that employees may divide their time between service as a union representative for their coworkers and service as a regular worker for the company, and that full-time union representatives are often drawn from among the ranks of the employer's workforce. Congress had to make

¹³ (...continued)

REC. 5,429 (1946). As Senator Overton quipped, "[t]he representatives of organized labor should be, like Caesar's wife, above suspicion." 92 CONG. REC. 5,181 (1946).

some provision for part-time representatives, who are entitled to wages for their service as regular workers, and for full-time representatives, who, as former employees, may be owed money for earned vacation time, severance pay, monthly pension payments, or the like. Section 302(c)(1) adjusts the ban on employer payments with respect to these individuals by continuing the prohibition as to their union activity but permitting employers to pay them for service as an *employee* "in spite of," not "because of" their ongoing service as a union representative. Pet. App. at 14a-15a (Mannsmann, J., dissenting). In other words, these individuals may be paid for service rendered while wearing a hard hat, but not for service rendered while wearing a union cap.

Organized labor is trying to exploit Congress' desire to draft this exception broadly enough to cover the various kinds of remuneration for services as an employee. The lower courts have generally agreed that the phrase "compensation for" refers to *wages*, while "by reason of" refers to non-wage *fringe benefits*. See *Phillips*, 19 F.3d at 1575; *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (CA2 1986) [hereinafter *BASF I*]. But labor has tried to wedge wage and benefit payments to union officials into section 302(c)(1) by labeling them a fringe benefit payable "by reason of" the full-time union representative's prior service as a regular worker.

Assuming that *wages* can even be considered *fringe benefits* payable "by reason of" an individual's "service as an employee,"¹⁴ the central question is what does this nexus

¹⁴ An immediate problem with this application of section 302(c)(1) is that the payments at issue here are wages—direct compensation for services as a union official. J.A. at 14-15, 16-17. Because the payments at issue are wages (*i.e.* compensation for

(continued...)

requirement mean? As detailed in the petition for certiorari, this question has divided the courts of appeals, which have formulated approximately four different standards. Pet. at 10-19. In the Second and Fifth Circuits, "by reason of" means but-for causation, at least with reference to "no docking" policies applicable to current employees. See *BASF I*, 791 F.2d at 1049; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 855 (CA5 1986) [hereinafter *BASF II*]. In the Seventh Circuit, it means that payments are "in some way motivated by" past service as an employee. *Toth v. USX Corp.*, 883 F.2d 1297, 1304 (CA7), cert. denied, 493 U.S. 994 (1989). In the Eleventh Circuit, it means—as the Third Circuit once said—that payments must be in exchange for "services actually rendered" by the individual when he or she was an employee of the company. *Phillips*, 19 F.3d at 1575; *Trailways*, 785 F.2d at 106. Now, the Third Circuit has broadly read the phrase to apply to any payments that the parties simply agree to *label* as remuneration for services as an employee. Pet. App. 10a-12a; see Part II, *infra*.

The Third Circuit got it right the first time. *Trailways* gave section 302(c)(1) the only sensible construction—one

¹⁴ (...continued)

services) and not fringe benefits, the "by reason of" language is simply inapposite.

The members of Congress who discussed section 302 seemed to believe that the "compensation for" language applied to hourly wages and that the "by reason of" language applied to remuneration for services actually rendered as an employee, but not calculated on a strict hourly basis. Senator Pepper, for instance, repeatedly expressed the view that the phrase "as compensation for, or by reason of, . . . service as an employee" applied to "wages or salaries." *E.g.* 92 CONG. REC. 5,073 (1946); accord *id.* at 5,336 ("[I]f the employer paid wages or pays salaries to the employee, neither the employer nor the employee would be guilty of violating the law.").

based on the provision's plain language, supported by its legislative history, and consistent with fundamental principles of federal labor policy.¹⁵ According to *Trailways*, "the statute contemplates payments to former employees for past services actually rendered by those former employees while they were employees of the company." 785 F.2d at 106 (emphases adjusted). The court there properly concluded that continuing pension contributions for benefits in recognition of *current* service as a union representative are not made in exchange for a representative's *past* service rendered as an employee.¹⁶

¹⁵ Similarly, in *Phillips*, the Eleventh Circuit adopted a sensible nexus requirement drawn from *Trailways*. The court held that "all payments from an employer to a union official must relate to services actually rendered by the employee." 19 F.3d at 1575 (emphasis added). In other words,

a payment given to a former employee must be for services he rendered while he was an employee to qualify for the exception. A payment given to a former employee for present or future services, which by definition could not be "as compensation for" or "by reason of" his "service as an employee," would violate the plain language of the exception and would be exactly the type of conflict-tainted payment that Congress designed the Taft-Hartley Act to prevent.

Id. (emphases added).

¹⁶ *Trailways* shows an additional risk of a broader construction of section 302(c)(1). There, the union was seeking to use section 302(c)(1) to justify payments to a pension fund because the payments did not meet the requirements of section 302(c)(5), which allows payments to pension funds only for the sole benefit of employees, not former employees. 29 U.S.C. § 186(c)(5) (1994); *Trailways*, 785 F.2d at 106-08. In *Trailways*, the Third Circuit refused to allow section 302(c)(1) to become a general catch-all provision for parties who did not want to comply with the restrictions imposed under other provisions of section 302. In this case, however, the Third Circuit majority ignored the conflict

(continued...)

This common-sense approach gives section 302(c)(1) bright lines and makes it workable. It limits the permissible payments to compensation or fringe benefits provided to employees in payment for actual services rendered to the employer.

Other interpretations, such as those in *BASF I* as well as *Toth*, tend to link payments not to the actual rendition of services but to the mere historical fact that an individual happened to have once worked for an employer. In *Toth*, for instance, the Seventh Circuit held that the "by reason of" language could include payments "motivated by" an employer's desire to induce its employees to become union representatives so it would not have to deal with outsiders or to promote goodwill between the employer and a representative by commemorating the representative's past service. See 883 F.2d at 1301. These vague rationalizations for payments have nothing to do with the value of the actual services rendered to the employer by the former employee during her prior employment. Even the Seventh Circuit itself recognized that allowing such open-ended "justifications" for payments to officials threatened to undermine section 302. *Id.* at 1303-04.¹⁷

¹⁶ (...continued)

between section 302(c)(5) and its interpretation of section 302(c)(1). The Departments of Justice and Labor as amicus noted this problem but felt it could be left to future cases. See Amended Br. of the United States as Amicus Curiae at 28, n.14. It cannot.

¹⁷ Even the Seventh Circuit, however, opined that "fulltime pay for no service cannot reasonably be said to be compensation 'by reason of' service as an employee." 883 F.2d at 1305; accord *BASF I*, 791 F.2d at 1050 (denying that employer could simply "put a union official on its payroll while assigning him no work."); *BASF II*, 798 F.2d at 856 n.4 (same).

The legislative history of section 302(c)(1) supports the *Trailways* interpretation. Senator Ball, who sponsored the amendment that became section 302, explained that section 302(c)(1) made an exception to the general prohibition only with regard to

money due a representative who is an employee or a former employee of the employer, on account of wages actually earned by him.

93 CONG. REC. 4,805 (daily ed. May 7, 1947), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1304 (emphasis added). Likewise, Senator Byrd, who sponsored section 302's predecessor in 1946, explained the forerunner of section 302(c)(1) as follows:

In some instances an employee will also be a labor representative, and there should be no prohibition from paying him his compensation for, or by reason of, his services as an employee.

92 CONG. REC. 4,891 (1946).

Simple common sense reinforces *Trailways*' straightforward interpretation of the statute. It does not set up an irrational distinction between union representatives who are former employees and those who were never employees of the employer. An irrational distinction *does* arise when one acknowledges that an employer may not pay the wages of a union official who is not a former employee but contends that an employer may pay the *same wages* to a full-time union representative who was its former employee for any period. Yet it cannot reasonably be the case, nor is there any historical indication, that Congress feared bribery, corruption, or the diversion of worker funds *only* where union representatives had never been employed by the employer. Is a stranger *more* likely than a former employee to be unduly influenced or corrupted by an employer? Is union financial independence from the employer or

union financial dependence on its dues-paying members any less undermined by payments to union officials who were once employed by the payor?¹⁸

In *Ryan*, this Court held that the term "representative" as used in section 302(a) is not limited to labor organizations themselves but includes individual union agents. 350 U.S. at 307. The Court reasoned that excluding "[p]ayments made directly to union officials" from section 302 "would frustrate the primary intent of Congress," *id.* at 305, would allow the ban to be "easily evaded," *id.*, and would "reduce the legislation to a practical nullity," *id.* at 306. Whether eroding the statute by exempting individual union agents occurs under section 302(a), as in *Ryan*, or section 302(c)(1), as here, the result is the same.

II. INCLUSION OF AGREEMENT TO PAY WAGES OF FULL-TIME UNION OFFICERS IN A COLLECTIVE BARGAINING AGREEMENT "APPROVED BY THE RANK AND FILE" DOES NOT EXEMPT SUCH PAYMENTS FROM THE PROHIBITION OF SECTION 302

In holding that the wages of full-time union representatives were payable "by reason of" past "service as an employee," the Third Circuit majority "reach[ed] this conclusion because the payments arose, not out of some 'back-door deal' with the union but out of the collective bargaining agreement itself." Pet. App. at 10a. Because the payments were "bargained-for" and, supposedly as a result, were fully "disclosed" to the rank-and-file, the majority thought there would be no harm "to the collective bargain-

¹⁸ This Court is undoubtedly aware and may take judicial notice that many, if not most, union officials at all levels of a union hierarchy started off as employees of some employer whose workers were represented by that union.

ing process" in permitting them. Pet. App. at 12a. Section 302, however, is aimed at protecting not only "the collective bargaining process" but also protecting the *purposes* of federal labor policy *from the collective bargaining process itself*, and agreements at cross purposes therewith. Although the majority offered several rationales to support its conclusion, none bears close scrutiny.

A. The Contention that "Service as an Employee" is Defined by the Terms of a Labor Contract is Circular and Contradicts the Text and Legislative History of Section 302

The Third Circuit majority's first rationale is definitional. It supposed that inclusion in the collective bargaining agreement of a provision authorizing employer payments to union officials is significant because

the contract . . . by defining the basis for the payments, speaks directly to the question posed by the statute as to whether the payments *are* "compensation for, or by reason of . . . service as an employee."

Pet. App. at 11a-12a (emphasis added). In other words, employer payments to full-time union representatives are payable "by reason of . . . service as an employee" if the parties merely agree they are in a collective bargaining agreement. They are because the parties *say* they are.

This reasoning is hopelessly circular. Section 302(a)(1) explicitly states that it shall be unlawful to "agree to pay" any money to any employee representative. 29 U.S.C. § 186(a)(1) (1994). Proponents of the above logic, nevertheless, would exempt from that prohibition any payments that an employer has *agreed* to pay in a collective bargaining agreement. They would, thus, prohibit an employer from agreeing to pay money it has not agreed to pay. But

nothing in the plain language of section 302 even hints that the provision of wages or benefits to union officials, if provided through a labor contract, is somehow exempt from the general ban on employer payments.¹⁹

If Congress had wanted, it "could easily have written an exception for payments by employers to union representatives pursuant to collective bargaining agreement." Pet. App. at 19a (Mansmann, J., dissenting). Indeed, in *other* provisions of section 302(c) Congress proved quite capable of explicitly exempting various extremely specific types of payments, such as payments made pursuant to "judgment[s]," LMRA § 302(c)(2), 29 U.S.C. § 186(c)(2) (1994), "award of an arbitrator," *id.*, "settlement . . . of [a] claim," *id.*, "sale or purchase of an article," LMRA § 302(c)(3), 29 U.S.C. § 816(c)(3) (1994), and the like. Congress has, moreover, expressly exempted a variety of payments to jointly administered, employer-union trust funds for the sole and exclusive benefit of employees, provided that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1994) (emphasis added). There is no comparable exception for wage, benefit, or expense payments to union officials if "authorized in a collective bargaining agreement."²⁰

¹⁹ As Judge Mansmann put it: "If an agreement to pay is unlawful under section 302(a)(1), it is illogical to use the same agreement as a basis for finding that the resultant payment is lawful under section 302(c)(1). Pet. App. at 19a.

²⁰ In fact, one Senator suggested a revision that would draw a distinction between employer payments that were included in a collective bargaining agreement and those that were not. The revision, however, actually would have made *unlawful* only payments agreed to "in the course of collective bargaining." 92 CONG. REC. 4,897 (1946) (statement of Senator Overton).

Beyond the sheer circularity of this rationale, it conflates two categories that Congress intended to treat as mutually exclusive subjects of legislation: service as an employee and service as a union representative. What the Third Circuit majority, spurred on by the Union, has done is collapse the latter into the former, so that compensation for *service as a union representative* is transfigured into a "fringe benefit" payable "by reason of . . . service as an employee." No transformation ever really occurs, however, because the wage payments at issue are triggered only by, and are paid only for, *service as a union representative*. Whatever the parties or their agreement may say, the union representative is still being paid to be a union representative. This *ipso facto* logic, as Judge Mansmann noted, so "expands the exception . . . that the rule is rendered a nullity." Pet. App. at 20a.

B. The Contention That Payments to Union Officials Are Lawful if Funded by Wages Diverted from Employees Is Self-Refuting

To bolster its definitional argument, the Third Circuit majority offered another rationale that attempted to reconceptualize the payments at issue as a kind of "fringe benefit" accrued by an employee during his service as a regular worker. The majority supposed that because the payments were agreed to "in the bargaining process,"

every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

Pet. App. at 10a. At core, this reasoning rests on the same circular logic as the majority's definitional theory: Every provision of a collective bargaining agreement is, *by defi-*

nition, part of the consideration paid to employees "by reason of" their services as employees. Why? Because the parties say so. If the agreement authorized the payment of wages to employees who become full-time union representatives, then the payments *must* be an employment benefit payable to them because of their service as an employee. See Pet. App. at 10a-11a. This contrivance, however, is rife with analytical flaws.

First, it glosses over the fact that the statutory language specifically authorizes employer payments to a union representative only "by reason of . . . his service as an employee," 29 U.S.C. § 186(c)(1) (1994), not by reason of the collective service of the employer's workforce as a whole. Yet the allegedly earned benefit is not tied to any particular quantum of individual service as an employee. A term of employment whereby an individual's service actually *earns* a paid leave of absence, however, reasonably would be expected to entail at least some durational relationship between length of service and length of paid leave, or some other principle of proportionality.²¹ Under the majority's analysis, however, an employee would be eligible to take a paid leave of absence to perform union activities for years or even decades based merely on his service as an employee for one month or one week. The parties could make such leave available, moreover, with any agreed upon level of income or benefit package.²²

²¹ Judge Mansmann notes this absence of proportionality and offers a number of examples which demonstrate that the incongruity of perceiving such leaves as a contingent benefit earned by the individual's service. See Pet. App. at 21a & n.6.

²² In fact, the bylaws of Local 786 merely require that members be in good standing for one year prior to nomination. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 4-5. The UAW's contractual arrangement with Caterpillar contains no durational requirement. J.A. at 3-10, 13-18.

The reality behind this "fringe benefit" facade is that the union representative receiving the wages does not in any sense of the word "*earn*" or "*accrue*" the paid leave. Every other employee is "*earning*" it for him and is *funding* his salary by *reduced* wages. See Pet. App. at 39 (Alito, J. dissenting). The irony, of course, is that the Union and the court have sought to justify these payments as nothing but an "expanded no-docking" policy. In fact, this indefinite paid leave is a *massive wage-docking* policy. It docks the wages of regular workers in order to pay the wages of full-time union officials.

Such payments, therefore, contravene a core purpose of Congress in enacting section 302: preventing "*diversions*" of employee wages to union coffers or the pockets of union officials. See Part I.A., *supra*. By preventing payments from an employer to a union, Congress ensured that any union funding would come from dues-paying workers. As Senator Taft and others explained,

[t]he [provision] proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers, except under the process of strict accountability.

S. REP. NO. 105, 80th Cong. at 52 (1947) (supplemental views), *reprinted in* 1 LEG. HIST. LMRA at 458; *accord* 92 CONG. REC. 5,340 (1946) ("This [provision] is aimed at one thing, namely, bypassing the employees by paying money directly to their representative, who is supposed to be bargaining for them." (statement of Senator Taft)).

Congress did not suggest that collective bargaining provided the desired "process of strict accountability." Indeed, Congress was specifically concerned that union negotiators, whether for evil purpose or even with good intentions,

might use the process of collective bargaining to divert to union or personal uses money that rightfully should have gone to the workers as wages. See 93 CONG. REC. 4,876 (daily ed. May 7, 1947) (statement of Senator Taft observing that restrictions must be placed on bargaining representatives, who should have "no right to obtain any personal advantage"), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1311. Indeed, opponents of section 302 consistently and vigorously attacked section 302 for interfering with "free collective bargaining." S. REP. NO. 105, PT. 2, 80th Cong. at 23 (1947) (minority views), reprinted in 1 LEG. HIST. LMRA, *supra*, at 485; accord 93 CONG. REC. 4,806 (daily ed. May 7, 1947) (statement of Sen. Pepper) ("This is another one of those instances where it seems that certain individuals do not credit the union membership with any authority whatever over the selection of or the conduct of their own leaders."), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1306.

The peculiar rationale behind this "fringe benefit" theory presents, therefore, the precise specter that Congress sought to banish. The reasoning of the Third Circuit majority has transformed a statutory evil into a reasoned justification.

This wage-diversion rationale also creates a basic conflict with another fundamental principle of federal labor law—the statutory right of individual employees to *refrain* from union membership. 29 U.S.C. § 157 (1994). Federal law allows states to enact "right-to-work" laws, which require employers and unions to maintain "open shops"—workplaces in which individual employees are free to work without mandatory union membership. 29 U.S.C. § 164(b) (1994); see, e.g., TENN. CODE ANN. § 50-1-201 (1995) ("It is unlawful for any person . . . to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join

or affiliate with any labor union or employee organization of any kind."). Under those laws, no employee may be forced to join a union or pay any union dues against her will. Even in states where "union shops" are lawful and membership is properly a condition of employment, employees may restrict their support of a union to core financial membership. *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988).²³

If the decision below is allowed to stand, labor contract negotiators can abridge these worker rights. Union leaders and, indeed, members can effectively force non-members—who are not entitled to hold union office or vote on the contract—to suffer a wage cut in order to subsidize the wages, benefits, and presumably even expenses of union officials. Such a provision in a collective bargaining agreement would allow union members to spread the costs of union activities to all employees, including non-members, rather than placing those costs only on those who choose to join the union and pay its dues. Thus, the reasoning below threatens to drive open shops into irrelevance and nullify both state right-to-work laws which guarantee non-union workers the right to shield their wages from union tax collectors, see *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 102 (1963), and this Court's *Beck*

²³ Under *Beck*, an employee may pay reduced union dues that cover only the costs of collective bargaining and related activities; unions may not force employees to subsidize activities unrelated to bargaining. 487 U.S. at 762-63. This Court explained that Congress has allowed dues collection from all employees in a union shop to avoid the "free rider" problem, *id.* at 773, but sought to "limit[] the expenditures that may properly be charged to nonmembers . . . to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.'" *Id.* at 752 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 447-48 (1984)).

doctrine under which an employee can limit financial support to matters directly attributable the collective bargaining process. As Senator Ball pointed out, section 302 "covers *not only union members* who presumably have some voice in the selection of the business agent, *but all employees*." 93 CONG. REC. 4,883 (daily ed. May 8, 1947) (emphasis added), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1322.²⁴

Finally, the exchange of "reduced wages and benefits" for union officer wages or benefits would seem to acknowledge or envision the very type of potential conflict of interest with which Congress was concerned. Presumably, Congress did not worry about those employers, if any, who would pay union officials out of a sense of largesse, expecting nothing in return. Instead, it is exactly the risk that union officials might "implicitly" (to use the Third Circuit majority's own term) agree to lower wages, less substantial increases, narrower benefit entitlements or a "break here and there" on disputed issues in return for payments that Congress sought to avoid, not embrace.

C. The Contention that Contract Ratification Is an Adequate Safeguard Contradicts the Reality and Congressional Opinion of Collective Bargaining

The Third Circuit majority offers a third rationale for allowing payments agreed to in collective bargaining agreements. It states that the payments

are contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote. Thus, the officials receiving the

²⁴ As articulated by the Third Circuit majority, there is nothing in this so-called collective bargaining exception that would limit payments only to union officials for contract-related activities. See Part II-C, *infra*.

payments can be held accountable to the membership.

Pet. App. at 12a.

This thinking is best categorized as a profession of faith in the collective bargaining process and the ability of the "rank and file" to adequately police payments between its employer and the union's officers. Such sentiments, however, actually are at odds with the views upon which Congress acted.²⁵ Section 302 generated intense debate and controversy precisely because it placed substantive limits upon the terms that employer and union negotiators could agree to include in collective bargaining agreements.²⁶ Opponents vigorously decried section 302 as interfering with free collective bargaining. See Part II-B, *supra*.

Moreover, such blind faith simply is not well founded. Labor agreements are complex documents and the tradeoffs anything but apparent. What has been noted about "laws and sausages" is also true of labor agreements: the process

²⁵ See, e.g., 93 CONG. REC. 4,883 (daily ed. May 8, 1947) (colloquy between Senators Ball and Barkely), *reprinted in* 2 NLRB, LEG. HIST. LMRA, *supra*, at 1321-22.

²⁶ Senator Taft, who led the movement to enact the Labor Management Relations Act in 1947, insisted that

certainly there should be some restriction on the right of those who bargain collectively for the employees . . . as to how far they can take the money earned by the employees and use it for union purposes without restriction.

93 CONG. REC. 4,876 (daily ed. May 8, 1947), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1311. In fact, the sponsor of the amendment that became section 302 expressed his outrage that in some instances "unions have even relinquished *wage demands* in order to secure" a particular form of employer payment. 93 CONG. REC. 4,805 (daily ed. May 7, 1947) (statement of Senator Ball) (emphasis added), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1305.

by which they are made is not necessarily a pretty sight. See *Community Nutrition Institute v. Block*, 749 F.2d 50, 51 (CA DC 1984). What tradeoffs led to which concessions often defy description. No current law mandates a process of any, let alone "full," disclosure, or the issuance of explanatory "impact statements" setting out the various economic tradeoffs. Members do not have access to bargaining information on the same basis as their representatives and they have no statutory right to such information. *Fulk v. United Transportation Union*, 81 F.3d 733, 736 (CA7 1996); *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1972-76 (CA9 1992). Given that, it is axiomatic that employers have no way to know, and no recognized right to know, whether or to what extent the various "quid pro quos" have been explained. Nor do all "rank and file" employees in the unit get to vote. Only members in good standing vote. In fact, no principle of federal law even mandates that union members must be permitted to ratify by vote unless the union's constitution so provides. See, e.g., *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1111 (CA6 1986) (*en banc*); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 666 (CA7 1992).

In recognition of the potential dangers, even the current Departments of Labor and Justice, as *amici* below, were not prepared to endorse such unfettered deference to the collective bargaining process. Although seeking reversal of the District Court, they urged remand so that the court could determine whether the facts met a number of non-textual limitations they proposed to engraft onto the Union's collective bargaining exception. The Departments of Justice and Labor were concerned about cases in which payments were "clearly so incommensurate with [a union representative's] former employment as not to qualify as payments 'in [sic] compensation for or by reason of' that employment."

Amend. Br. for the United States as Amicus Curiae at 27 (quoting *Toth*, 883 F.2d at 1305). In addition, they suggested it was relevant whether the paid union representative happened to be an individual who had "worked in the bargaining unit" and had been "elected to his position by his fellow employees" and is receiving pay that is "dependent on and limited to [the representative's] continuing role in the grievance process." *Id.* at 24. Finally, they called for courts to "closely scrutinize[]" cases in which the payments are made "to an individual who negotiates the terms of those payments" or "to an individual who has not worked for the company in his regular job for an extended period" and "is unlikely to return to such work." *Id.* at 28.

The Departments' obvious reservations and their proposed limitations vividly anticipate the very type of mischief that may be unleashed in allowing unions to negotiate wages and benefits for their officials and agents where the sole criteria are "whether the persons who receive the payments have ever been in the 'service' of the employer," *id.* at 15, and whether the payment is included in a collective bargaining agreement. The fears implicit in the United States' proposals are certainly well warranted. The problem, as Judge Alito noted in dissent (and even the Third Circuit majority apparently conceded), is that none of these limitations can be "tease[d]" from the statutory language or its legislative history. Pet. App. at 44a. If the collective bargaining agreement defines what is to be deemed "'consideration for services rendered,'" *id.* at 11a (quoting *Trailways*, 785 F.2d at 109 (Becker, J., dissenting)), then definitional power lies with the parties. It matters not what those terms are. It matters not how those terms made their way into the agreement and it matters not how those terms were approved as long as the process complies with other federal laws applicable to the negotiation and formation of

labor agreements. Wages and benefits may be paid in whatever amount is negotiated, to any former employee regardless of length of service or prior position, selected by any means to fill any union office regardless of function. The agreement need only be approved in accordance with that particular union's duly adopted constitution.²⁷

The point is the Third Circuit's analysis leaves little if anything for section 302(a) to prohibit that cannot be permitted by inclusion in a "section 302(c)(1) agreement". The government's reservations and the obvious unacceptability of this state of affairs under the plain language of section 302 should give substantial pause even to the most ardent believer in collective bargaining and unionism. If the salaries of union officials need to be funded through their members' wages, the obvious answer is to negotiate wages that allow members to pay dues and fund their union directly themselves, retaining to themselves ultimate control of their union's finances and the salaries of the officials elected or appointed to serve them. In short, both the elaborate construct and implicit tradeoffs conjured up by the Union to justify perpetuation of this growing subsidy and the further emasculation of section 302(a) as well as the Departments' proposed remedial scheme of vague "rebuttable presumptions", "reasonable relationship", "special

²⁷ Indeed, given the Third Circuit's rationale that the wages of union officials are actually benefits to the members, one can readily envision an extension of the reasoning to abandon the requirement that the official have *ever* been an employee. One need simply hypothesize that the payment of his or her wages or provision of his or her benefits is a "fringe benefit" to the employees who receive free (or lower cost) union representation not unlike an employer-paid group legal services plan. Judge Mansmann recognizes this possible extension of section 302(c)(1) given the majority's rationale and the absurdity of the result. Pet. App. at 21a.

scrutiny" and "open negotiation" tests are utterly unnecessary to provide a means for the funding of union services.

III. PAYING THE WAGES OF FULL-TIME UNION OFFICIALS GOES WELL BEYOND THE LIMITED "NO DOCKING" PRACTICES ARGUABLY PERMITTED UNDER SECTION 302

The rule of section 302 is unambiguous: employer payments to anyone—whether employee, former employee, or stranger—for service as a union representative is prohibited.

Although this case does not require resolution of the issue, consistent construction of section 302 with congressional intent as expressed in the proviso to section 8(a)(2) of the NLRA would suggest that it is appropriate to recognize a limited "no docking" exception to allow "employees to confer with [their employer] during working hours without loss of time or pay." 29 U.S.C. § 158(a)(2) (1994). Consistent construction of section 302 and the narrow proviso to section 8(a)(2), however, most assuredly does not necessitate or justify paying the wages of full-time union officials. Neither the plain language nor legislative history of *either provision* even suggest such an expansive result. Moreover, there are very real and significant legal, practical, and economic distinctions between regular employees who may assist fellow workers as needed during the workday and full-time union officials.

A. The Language and Legislative History of Sections 8(a)(2) and 302 Support Limited "No Docking" of "Time and Pay" of Employee But Not Paying Wages for Full-Time Union Agents

Although section 302(c)(1) allows an employer to pay a current, active employee only for her "service as an employee," the proviso to section 8(a)(2) contains a narrow ex-

ception declaring that "an employer shall not be prohibited from permitting *employees* to confer with him during working hours *without loss of time or pay*." 29 U.S.C. § 158(a)(2) (1994) (emphases added). Consistent construction of the two provisions would warrant including time spent by an *employee* conferring with his employer during working hours concerning the terms of employment within the concept of "service as an employee."

In these circumstances, a court would be justified in applying the "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); accord *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & nn.7 & 8 (1976); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Ginsberg & Son, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in judgment).

Application of this rule, however, does not open section 302 to the kind of payments to full-time union representatives at issue here. Though stated in no uncertain terms, the exception that the section 8(a)(2) proviso creates is quite narrow. Its text allows only an *employee* to *confer* with her *employer*, presumably about terms and conditions of employment or related grievances, *during working hours* without suffering any *loss of time or pay*. This last requirement, that the employee should not suffer any *loss* of pay, clearly contemplates only payments to an individual who has a regular job with the employer during working hours for which the employer is already paying him compensation for service as a regular employee and which *time* and *pay* is not to be lost. Indeed, the very concept of not *docking* an individual's pay is nonsensical with respect to individuals who no longer perform any regular work for an employer.

The legislative history confirms this narrow construction. From its inception in 1935, the NLRA's proponents resisted attempts to broaden the proviso. Many interest groups sought to change the language of the proviso as proposed (and as ultimately adopted) in order to allow, *inter alia*, employers to pay employees to serve as union representatives. Some even wanted employers to be able to agree to pay the bargaining expenses of the union.²⁸ Senator Wagner, the bill's sponsor and chief architect, resisted all attempts to broaden the proviso on grounds important to the current controversy:

I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other.

Labor Disputes Act, Hearings Before the House Comm. on Labor on H.R. 6288, 74th Cong. 15 (1935) (statement of Senator Wagner), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2489.²⁹ The legislative history, therefore, specifically re-

²⁸ See *Hearings Before the Senate Comm. on Education and Labor on S. 1958*, Part 3, 74th Cong. 443-45 (1935) [hereinafter *Hearings on S. 1958*] (statement of Robert T. Caldwell, Attorney, American Rolling Mill Co.), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 1829-31 (1985) [hereinafter LEG. HIST. NLRA]; *id.* at 601-02 (statement of John Thomas Smith, Vice President, General Motors Co.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 1987-88; *id.* at 655-56 (statement of Clifford U. Cartwright, Secretary-Chairman, Employees' Representation Plan of the Oklahoma Pipe Line Co.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2041-42; *id.* at 714-15 (statement of William H. Davis, Chairman, Special Comm. on the Government and Labor of the Twentieth Century Fund, Inc.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2100-01.

²⁹ Senator Wagner never wavered in this position. Thus, for example, in hearings he observed as follows to one witness:

(continued...)

pudiates any suggestion that the proviso to section 8(a)(2) was intended to allow employer payments to union representatives who were *not* current, active employees. A 1935 Senate print analyzing the language of the NLRA explained the removal of the phrase "local representative" from the proviso as follows:

If such representatives are not employees, then they would not be compensated in any case. If they are employees, there is no need for a confusing additional term.

STAFF OF SENATE COMM. ON EDUCATION AND LABOR, 74TH CONG., MEMORANDUM COMPARING S. 1958 WITH THE BILL REPORTED AS A SUBSTITUTE FOR S. 2926 at 27 (Comm. Print 1935) (emphasis added), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 1353.

In construing section 302 as it relates to not docking the pay of regular employees who also serve as shop stewards, a number of courts have made reference to both the language and case law interpreting section 8(a)(2). In *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970), for instance, the court noted the proviso to section 8(a)(2) but did not find it very helpful in

²⁹ (...continued)

I believe you and I will agree on this proposition, that you could not be a very effective representative of the workers if you were paid for the services you rendered for the workers, by the employer with whom you are to bargain.

Hearings on S. 1958, supra, at 655 (statement of Cartwright), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2041; *accord id.* ("To me, I just feel that you cannot be a very loyal representative of the workers if you are paid by the other side."), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2041; *see also* S. REP. NO. 573, 74th Cong. 10-11 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2310.

applying section 302. The case involved an arrangement under which employees who were also union representatives received a fixed number of hours of employer pay (either four or six) each month to cover time spent in grievance meetings. The court rejected the employer's claim that the policy was unlawful under section 302 because the grievance meetings were often briefer than the allotted "no docking" period, so that the employee-representatives were receiving some payments for time *not* conferring with management. The court simply concluded that section 8(a)(2) did not address the situation, suggesting that the court gave section 8(a)(2) a quite narrow interpretation. The decision to permit the payments essentially rested on the *de minimis* nature of the payments. *Id.* at 461.

Although *Wyman Gordon* was hardly a sweeping endorsement of unlimited "no docking" policies under section 302, its result has been expanded. In *BASF I*, for instance, the issue was not four hours a month, but four hours a *day* to a regular, albeit part-time, union official. Yet the Second Circuit upheld a "no docking" scheme allowing employee-representatives to spend half of their working hours on union activities. There, the court also cited section 8(a)(2) but, unlike *Wyman Gordon*, used it as a justification for upholding the "no docking" scheme at issue. The court concluded that the legislative history of an unsuccessful attempt in 1947 to amend section 8(a)(2) showed that Congress had no objection to extending "no docking" policies beyond mere conferring with management. 791 F.2d at 1051-53.³⁰ Based in part on that analysis, the court read

³⁰ The court misread the legislative history. The attempt to amend section 8(a)(2) to permit greater leeway for "no docking" policies occurred in the House. *See* H. REP. NO. 245, 80th Cong. at 28-29 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 319-20. But the Senate's refusal to amend the provision prevailed in (continued...)

section 302(c)(1) to permit four hours of union pay per day.³¹ Nevertheless, the court explicitly limited its holding to *current* employees, the only ones to whom “no docking” policies “have relevance.” *Id.* at 1049 n.1; *see also Phillips*, 19 F.3d at 1575 n.18; Pet. App. at 23a-26a (Mansmann, J., dissenting).

However broadly the proviso to section 8(a)(2) should be interpreted, then, nothing in its language or legislative history permits either it or section 302(c)(1) to be expanded to include payments to individuals who are no longer even employees of the employer. The proviso to section 8(a)(2)

³⁰ (...continued)

the conference committee, *see* H. CONF. REP. NO. 510, 80th Cong. at 40-41 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 544-45, and the Senate generally approved of the NLRB’s strict enforcement of section 8(a)(2). *See* S. REP. NO. 105, 80th Cong. at 12 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 418.

³¹ *BASF I* may well have gone too far. The “no docking” policy approved there permitted employee-representatives to receive employer pay for much more than mere conferences with management because it generally allowed them to “conduct[] union business.” *See* 791 F.2d at 1047 (quoting collective bargaining agreement). Furthermore, these individuals were entitled to a fixed four hours of union time per day, regardless of the need for any grievance services. *Id.* Thus, the individuals were not simply available on an *ad hoc*, as-needed basis. Instead, they were regular, albeit part-time, union agents, more akin to the dual capacity agents/employees addressed in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 116 S.Ct. 450 (1995).

BASF II further expanded the flawed result in *BASF I*. In the second case, arising out of a different facility, the employer tried to limit a new union chairman to union activities only on an *ad hoc*, as-needed basis, because his predecessor had spent the four paid hours of release time for purely personal affairs. Nevertheless, the Fifth Circuit followed *BASF I* and refused to find the fixed, four hour policy unlawful under section 302. 798 F.2d at 856.

may warrant some indulgence when applying section 302 to active employees who perform representational services on the shop floor, when called upon to do so. But it certainly does not require a court to effectively read the substantive test of section 302(c)(1)—the requirement that pay relate to “service as an employee”—out of the statute altogether, reducing it to a mere requirement of a qualifying period of prior employment, however brief, which will justify subsequent compensation and benefits to union representatives for any duration that may be negotiated. If given that “spin,” Senator Wagner would hardly recognize the proviso he successfully fought to keep narrow.

B. There Are Substantial Legal, Practical and Economic Distinctions Between Limited “No Docking” of Current Employees Who, on Occasion, Perform Union Representational Services as Needed for Fellow Employees and Paying the Wages of Former Employees/Full-Time Union Officials Who Perform No Service for the Employer

The majority below placed heavy emphasis on its professed inability to see a distinction between employer “no docking” practices of the pay of current employees who perform a representational service as needed for fellow employees on the shop floor and what it described as “expanded ‘no-docking’ provisions” involved here. “[T]he nature of the absences and the payments made . . . is the same.” Pet. App. at 12a.

In failing to see any distinction, the court undertook no analysis of the legislative history of either section 8(a)(2) or section 302. Moreover, as the dissents noted, the court merely assumed, without analysis, that those courts which had approved “no docking” of current employees, including the regular part-timers in *BASF I*, were correct on the law.

Instead, the court embraced the Union's mathematical argument that there was no distinction between "granting four employees two hours per day of paid union leave" and "granting a single employee eight hours." Pet. App. at 10a.

In Caterpillar's view, however, the distinctions are real and substantial, if not immediately apparent to those focused merely on a quantity of hours.

First, equating a full-time official and employee of the union, who is charged with primary responsibility for performance of day-to-day union duties, with an employee of the employer who, like the civil defense volunteer, dons his union "hat" when needed, is unjustified. Even if it can be assumed *arguendo* that both can be subject to undue influence or that pay to both erodes the foundations of union financial independence, the union's full-time officials may be fairly presumed to stand in positions of greater authority, responsibility and power within the organization. Cir. App. at 177-78; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2, 8. If the union as an organization acts, it most assuredly acts through these individuals. *Id.* In this case, the full-time committeemen had extensive duties not committed to stewards, including participation in the negotiations. Cir. App. at 180-81, 183-85, 601-02, 612-13, 626-30. While these varying levels of responsibility, influence and power may be matters of degree, serious legal controversies "almost always involve matters of degree and often degree of the nicest sort."³² The full-time union officials most certainly superintend the activities of the employee-representatives. Cir. App. 177-81.

³² Felix Frankfurter, *Sixth Annual Benjamin Cardozo Lecture: Some Reflections on the Reading of Statutes*, THE RECORD OF THE ASSOCIATION OF THE BAR OF NEW YORK, No. 6 (1947).

If the employee-representative is influenced by allowing him not to be docked in the same manner the employee he represents is not docked, at least the union's full-time officials, paid by *the members*, stand in oversight.

Second, there is an obvious legal distinction. It is as clear and well established in law as the distinction between an employee and a non-employee. The full-time union official, whether or not he *was* an employee of the employer, is not an employee of the payor.³³ More importantly in terms of

³³ The NLRB's administrative law judge, the District Court, and the Third Circuit majority as well as its dissenters uniformly held that the full-time committeemen are not current, active Caterpillar employees. This determination is amply supported by the evidence. For example, the administrative law judge found

there are indicators suggesting the [full-time committeemen] are really employees of the Union. They are responsible to the membership for their work product. [Caterpillar] has no control over the manner and means by which they perform their functions as representatives of the employees.

Pet. App. at 78a. The judge further found "the fact of the matter is that they perform no productive work for [Caterpillar]. They do perform work for the Union." *Id.*

Likewise, the District Court held Caterpillar did not exercise sufficient control over the full-time committeemen to classify them as its employees because the Company did not control the tasks they performed or the manner in which they performed them. Pet. App. at 57a-58a. Every member of the Third Circuit agreed that the full-time committeemen cannot be considered current employees of Caterpillar within the meaning of section 302(c)(1). Pet. App. at 7a-8a; *id.* at 13a (Mansmann, J., dissenting); *id.* at 31a-33a (Alito, J., dissenting). It found the full-time committeemen perform no work for Caterpillar's benefit. *Id.*; *cf. Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (CA6 1981) (holding full-time union representative to be employee of union, not employer); *United States v. Kaye*, 556 F.2d 855, 864-65 (CA7) (same), *cert. denied*, 434 U.S. 921 (1977).

the purposes of section 302, she is not just *not* an employee of the payor, she *is* an employee of the union, acting exclusively as its representative and agent.³⁴

In *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 116 S. Ct. 450 (1995), the Court deferred to the NLRB's conclusion that paid union organizers were employees within the meaning of the NLRA as consistent with the NLRA's purposes and common law principles. *Id.* at 453-55. The Court cited, *inter alia*, the definition of "employee" in Black's Law Dictionary as consistent with the NLRA:

a "person in the service of another under any contract of hire, express or implied, oral or written, *where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.*"

³⁴ In Caterpillar's case, the York Chairman, for example, did not even reside in the plant, visiting it instead only one day a week. Cir. App. at 174, 188-89. Union stewards and part-time committeemen, however, are current, active employees of Caterpillar who perform their representational functions on an *ad hoc* as needed basis, and then return to their regular production and maintenance jobs. J.A. at 44; Cir. App. at 166. Under Article 4.3 of the expired Central Agreement, such employees must obtain permission from their immediate supervisor before leaving their immediate work area to process a grievance and must present that pass to the supervisor of the area they wish to visit. J.A. at 12. Moreover, under Article 4.2, the amount of time they spend processing grievances may not be unreasonable. J.A. at 10-12.

In sharp contrast, the full-time committeemen are assigned no work by Caterpillar. Cir. App. at 187-88. They perform their duties at the union hall and are in the plant only one or one-and-a-half days per week. *Id.* at 188-89. Although assigned to the Labor Relations Department for payroll accounting purposes only, they are not supervised by Labor Relations, which merely approves their time sheets for payroll purposes. J.A. at 123-25; Cir. App. at 174-75, 187-88, 190.

516 U.S. at ___, 116 S. Ct. at 454 (quoting Black's Law Dictionary 525 (6th ed. 1990)) (emphasis added). Here, Caterpillar does not have the power or right to control or to direct how the full-time union officials perform their duties. The distinction is not between "4x2" versus "8x1"; the real distinction is between one who is an employee and one who has ceased to be an employee of one organization and has become the employee of another organization *where*, under the statutory scheme, the latter is supposed to be completely financially independent of the former.

The *third* distinction is revealed by the Third Circuit majority's own "reduced-wage" rationale. In the case of the current employee serving only when and as needed, and otherwise working for the employer, it is at least arguable that he provides valuable work which earns, by *his own service*, both his pay *and* the accommodation that it not be docked. In the case of the full-time union official, on leave for years or decades, the court was quite right in recognizing that, in the final analysis, his full-time salary is being earned and funded, *not* by his service, but by the reduced wages of everyone else—precisely the type of diversion of wages to the union that Congress sought to avoid. Here again, while this distinction may or may not be one of degree, it is an important degree, indeed.

CONCLUSION

The decision of the Third Circuit should be reversed, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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NOVEMBER 1997

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATERPILLAR, INC.,
v. *Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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65 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	10
LMRA § 302 DOES NOT MAKE IT A FEDERAL CRIME FOR AN EMPLOYER AND A UNION TO ENTER INTO A COLLECTIVE BARGAIN- ING AGREEMENT PERMITTING EMPLOYEES ELECTED TO A UNION OFFICE TO DE- VOTE PART OR ALL OF THEIR TIME TO THEIR REPRESENTATIONAL RESPONSIBIL- ITIES WITHOUT LOSS OF PAY	10
A. Introduction	10
B. The Statutory Language	17
C. The Legislative History	27
D. Caterpillar's Arguments of Policy	42
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959).....	25, 29, 42
<i>Arthur J. O'Leary & Sons</i> , 8 NBA War Lab. Rep. 421 (1943)	14
<i>Auciello Iron Works Inc. v. NLRB</i> , — U.S. —, 116 S.Ct. 1754 (1996)	43
<i>Aviation Corp.</i> , 28 BNA War Lab. Rep. 187 (1945)	14
<i>Axelson, Inc.</i> , 234 N.L.R.B. 414 (1978), <i>enf'd</i> , 599 F.2d 91 (5th Cir. 1979)	40
<i>BASF Wyandotte Corp.</i> , 274 N.L.R.B. 978 (1985), <i>enf'd</i> , 798 F.2d 849 (5th Cir. 1986)	40-41
<i>BASF Wyandotte Corp. v. Local 227</i> , 791 F.2d 1046 (2d Cir. 1986)	23
<i>Bingler v. Johnson</i> , 394 U.S. 741 (1969)	23-24
<i>Bureau of Alcohol, Tobacco & Firearms v. FLRA</i> , 464 U.S. 89 (1983)	49
<i>Caterpillar Tractor Co.</i> , 2 BNA War Lab. Rep. 75 (1942)	14
<i>Chemical Workers v. Pittsburgh Glass</i> , 404 U.S. 157 (1972)	20
<i>Commissioner v. Smith</i> , 324 U.S. 177 (1945)	21
<i>Consumer Prod. Safety Comm'n v. GTE Sylvania</i> , 447 U.S. 102 (1980)	17
<i>CWA v. Bell Atlantic</i> , 670 F. Supp. 416 (D.D.C. 1987)	41
<i>Davis v. Michigan Department of Treasury</i> , 489 U.S. 803 (1989)	21
<i>Dowd Box Co. v. Courtney</i> , 368 U.S. 502 (1962)	28
<i>Employees Independent Union v. Wyman Gordon</i> , 314 F. Supp. 458 (N.D. Ill. 1970)	41-42
<i>E.W. Bliss Co.</i> , 28 BNA War Lab. Rep. 270 (1945)	14
<i>Fairchild Engine & Airplane Corp.</i> , 16 BNA War Lab. Rep. 633 (1944)	14
<i>Finnegan v. Leu</i> , 456 U.S. 431 (1982)	37
<i>Firestone Tire & Rubber Co.</i> , 27 BNA War Lab. Rep. 105 (1945)	14
<i>Foster v. Dravo Corp.</i> , 420 U.S. 92 (1975)	21-22

TABLE OF AUTHORITIES—Continued

	Page
<i>Frank Foundaries Corp.</i> , 14 BNA War Lab. Rep. 229 (1944)	14
<i>Garcia v. United States</i> , 469 U.S. 70 (1983)	24
<i>Goodyear Aircraft Corp.</i> , 13 BNA War Lab. 65 (1943)	14
<i>Hannaford Bros. Co.</i> , 119 N.L.R.B. 1100 (1957)	39
<i>Herrera v. UAW</i> , 73 F.3d 1056 (10th Cir. 1996)	41
<i>IBEW v. National Fuel Gas</i> , 16 Employee Benefits Cases (BNA) 2018 (W.D. N.Y. 1993)	41
<i>International Harvester Co.</i> , 1 BNA War Lab. Rep. 112 (1942)	14
<i>International Shoe Co.</i> , 14 NLRB 1140 (1939)	20
<i>Litton Financial Printing Div. v. NLRB</i> , 501 U.S. 190 (1991)	21
<i>Massachusetts v. Morash</i> , 490 U.S. 107 (1989)	22
<i>McQuay Norris Mfg. Co.</i> , 9 BNA War Labor Rep. 538 (1943)	14
<i>Michigan National Bank v. Michigan</i> , 365 U.S. 467 (1981)	49
<i>Niles-Bement-Pond Co.</i> , 5 BNA War Lab. Rep. 489 (1943)	14
<i>NLRB v. Amaz Coal Co.</i> , 453 U.S. 322 (1981)	44
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	41
<i>National Fuel Gas Distribution Corp.</i> , 308 N.L.R.B. 841, (1992)	41
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	17
<i>Reinforcing Iron Workers Local 426 v. Bechtel Power Co.</i> , 634 F.2d 258 (6th Cir. 1981)	45-46
<i>Social Security Board v. Nierotko</i> , 327 U.S. 358 (1946)	21
<i>Soconoy Vacuum Oil Co.</i> , 11 NLRB 28 (1939)	20
<i>Sunnen Products</i> , 189 N.L.R.B. 826 (1971)	40
<i>Tabardrey Mfg. Co.</i> , 8 BNA War. Lab. Rep. 346 (1943)	14
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), <i>cert. denied</i> , 493 U.S. 994 (1989)	42
<i>UAW v. CTS Corp.</i> , 783 F. Supp. 390 (N.D. Ind. 1992)	41

TABLE OF AUTHORITIES—Continued

	Page
<i>UMWA Health & Retirement Funds v. Robinson</i> , 455 U.S. 562 (1982)	29
<i>United States v. Carter</i> , 353 U.S. 210 (1957)	22
<i>United States v. Enmons</i> , 410 U.S. 396 (1973)	42
<i>United States v. Motzell</i> , 199 F. Supp. 192 (D.N.J. 1961)	42
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir.), cert. denied, 514 U.S. 1003 (1994)	42
<i>United States v. Ryan</i> , 350 U.S. 299 (1956)	28
<i>United States Gypsum Co.</i> , 18 BNA War Lab. Rep. 682 (1944)	14
<i>United States Catridge Co.</i> , 12 BNA War Lab. Rep. 616 (1943)	14
<i>Western Electric Co.</i> , 18 BNA War Lab. Rep. 276 (1944)	14

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 <i>et seq.</i>	20
Americans With Disabilities Act, 29 U.S.C. §§ 706 <i>et seq.</i>	20
Civil Service Reform Act, 5 U.S.C. § 7131	48-49
Family and Medical Leave Act, 29 U.S.C. §§ 2101 <i>et seq.</i>	20
Labor Management Cooperation Act of 1978, 29 U.S.C. § 175a	18
Labor Management Relations Act of 1947, P.L. 80- 101, 61 Stat. 136	
§ 301, 29 U.S.C. § 185	28
§ 302, 29 U.S.C. § 186	<i>passim</i>
§ 303, 29 U.S.C. § 187	28
§ 501(3), 29 U.S.C. § 142(3)	20
National Labor Relations Act, 29 U.S.C. §§ 151 <i>et seq.</i>	
§ 2(2), 29 U.S.C. § 152(2)	20
§ 7, 29 U.S.C. § 157	20
§ 8(a)(2), 29 U.S.C. § 158(a)(2)	27
§ 8(a)(5), 29 U.S.C. § 158(a)(5)	8
§ 10(c), 29 U.S.C. § 160(c)	35

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
92 Cong. Rec. (1946)	28, 29, 30
H.R. 4908, 79th Cong. 1st Sess. (1946)	28
H.R. 5262, 79th Cong. 1st Sess. (1946)	28
H.R. 3020, 80th Cong. 1st Sess. (1947)	35
H.R. Rep. 245, 80th Cong. 1st Sess. (1947)	30
H.R. Rep. 510, 80th Cong. 1st Sess. (1947)	35, 36, 37
S. 55, 80th Cong. 1st Sess. (1947)	32
S. 360, 80th Cong. 1st Sess. (1947)	31
S. Rep. 1177, 79th Cong. 1st Sess. (1946)	28
S. Rep. 105, 80th Cong. 1st Sess. (1947)	31
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National Labor Relations Board, Legislative His- tory of the Labor Management Relations Act of 1947	31, 32, 35, 36

MISCELLANEOUS

I. Bernstein, <i>Turbulent Years: A History of the American Worker 1933-1941</i> (1970)	12
<i>Black's Law Dictionary</i> (5th ed.)	21, 24-25
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Bureau of Labor Statistics, <i>Labor-Management Contract Provisions 1950-51</i> (Bull. No. 1091, 1951)	39
Bureau of Labor Statistics, <i>Collective Bargaining Clauses: Company Pay for Time Spent on Union Business</i> (Bull. No. 1266, 1959)	39
Bureau of Labor Statistics, <i>Major Collective Bar- gaining Agreements</i> (Bull. No. 1425-1, 1964)	39
Bureau of Labor Statistics, <i>Collective Bargaining Provisions: Grievance and Arbitration Provi- sions</i> (Bull. No. 908-16) (1950)	11
Bureau of Labor Statistics, <i>Grievance Procedures Under Collective Bargaining</i> (1946)	15

TABLE OF AUTHORITIES

	Page
Bureau of Labor Statistics, <i>Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business</i> (1980)	15-16, 44
Bureau of Labor Statistics, <i>Union Agreement Provisions</i> (1942)	15
Bureau of National Affairs <i>Wage and Hour Manual</i> (1944-45 cum. ed.)	14-15
Bureau of National Affairs <i>Wage and Hour Manual</i> (1949 ed.)	15, 39
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International Union, United Automobile Workers of America, <i>Agreements Entered into Between International Union, United Automobile Workers of America and Employers in the Automobile and Other Industries</i> (May, 1937)	11-12
National Association of Manufacturers, <i>NAM Law Digest</i> (June, 1947)	38
Reilly, <i>The Legislative History of the Taft-Hartley Act</i> , 29 G.W. L. Rev. 285 (1966)	35
H. Shulman & N. Chamberlan, <i>Cases on Labor Relations</i> (1949)	13

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

For many years, the respondent UAW and various of its local unions, including respondent Local 786 (collectively the "Union"), have served as the exclusive representative of the employees of petitioner Caterpillar Inc. (the "Company") at plants throughout the country including the York Pennsylvania plant which is the focus of this case. At periodic intervals, the parties have negotiated "central" collective bargaining agreements covering all of these plants, and "local supplements" covering individual plants. The last central collective bargaining agreement and local supplement covering the York plant (together referred to as the "Collective Bargaining Agreement" or the "Agreement") was consummated in 1988 and expired in 1991; over the ensuing six years the parties have been unable to reach agreement on a new labor contract but continue to abide by many of the terms of the expired Agreement.

The Grievance Process and the Representational Structure—The Collective Bargaining Agreement—like its predecessor agreements and like virtually every other collective bargaining agreement—establishes a multi-step procedure to resolve "any difference which may arise between the parties, or between the Company and an employee as to . . . [a]ny matter involving the interpretation, application or violation of any provisions of this Agreement" or "[a]ny matter relating to wages . . . not covered by this Agreement." Joint Appendix ("J.A.") 18. This process allows grievances to be considered by successively higher levels within the Company and the Union.

The process begins with a meeting between the "aggrieved employee . . . his Steward [and] his Foreman." J.A. 45. If the grievance is not "satisfactorily adjusted" in Step 1, the "Plant Grievance Committeeman" for the "zone" in which the aggrieved employee works "take[s] the grievance to the Superintendent." *Id.* Absent a satisfactory resolu-

tion in Step 2, the grievance proceeds to Step 3 in which "the Plant Grievance Committee . . . present[s] the grievance . . . to the Labor Relations Manager." *Id.* If still not resolved, the matter goes to Step 4 in which the grievance is considered by a "Review Committee" which includes the Local Union President, the Grievance Committee Chairman, and up to four representatives of management. J.A. 46-47.¹

The Collective Bargaining Agreement goes on to provide that if the Local Union cannot resolve the grievance after Step 4, the Local "shall refer the grievance" to the International Union. C.A. App. 54.² The UAW may elect to appeal the grievance to final and binding arbitration before a mutually-agreed upon Permanent Arbitrator. *Id.*

The process just described required the parties to establish within each plant what the Collective Bargaining Agreement terms "a system of Union Representation for the processing and settlement of grievances." J.A. 3. In the case of the York plant, the Agreement provides for (i) over 100 stewards to be "elected from among the employees under the supervision of each Foreman," J.A. 43; (ii) "[n]ine plant committeeman," each elected from and representing defined geographic areas and shifts within the plant, J.A. 5-6; and (iii) of particular relevance here, a "Chairman of the Grievance Committee" who also "shall be elected from among employees in the bargaining unit," J.A. 6.³

¹ In Steps 3 and 4 the Local may enlist the "assist[ance]" of an "International Representative" employed by the UAW. J.A. 6.

² "C.A. App." refers to the joint appendix that was filed in the Court of Appeals.

³ The Agreement also provides for one "Alternate Committeeman" who "shall be elected from among employees in the bargaining unit," and who "shall act as the Chairman of the Grievance Committee in his absence" and "assist the Chairman in conducting his business." J.A. 6, 43. The Alternate is paid on the same basis as the Chairman; like the courts below, we use the term "Chairman" to refer to both the Chairman and his Alternate.

The Collective Bargaining Agreement goes on to define the six "duties and privileges" of the Grievance Chairman as follows:

- (1) act in place of an absent Committeeman; (2) serve as a Committeeman for a specific area, plant or location . . . (3) investigate grievances pending [in] the Third and/or Final Step of the grievance procedure . . . ; (4) discuss Third and/or Final Step grievances with Company representatives . . . ; (5) participate in joint investigations agreed to in a Third and/or Final Step grievance meeting; (6) consult with the Regional Director of the International Union, or his designated representative, on the disposition of any grievance denied in the Third and/or Final Step of the grievance procedure . . . [J.A. 13-14]

The Chairman "shall exercise only the privileges above set forth or those which have otherwise been mutually agreed upon." J.A. 14.

The No-Docking Provisions—For many years, continuing through the 1988 Agreement, the parties' agreements permitted the Local grievance representatives—the stewards and committeemen (one of whom also served as chair of the grievance committee)—to take time off as needed, without loss of pay, to represent employees in the grievance procedure. J.A. 58. The limits on this permission were (and are) that the stewards and committeemen are required to obtain approval from their supervisor each time they need to attend to a grievance, and are not to be paid to the extent the amount of time spent is "unreasonable." J.A. 11, 12.⁴

Over time, the volume and complexity of the grievances reached the point that, *de facto*, some committeemen

⁴ Caterpillar's brief implies that stewards and committeemen are paid only for time spent "discuss[ing] the grievance with management." Pet. Br. 2. That is not the case: the Collective Bargaining Agreement provides, by its terms, that stewards are paid for time spent "discuss[ing] a grievance with the aggrieved employee" or with "the Plant Grievance Committeeman who would handle the grievance in Step 2"; and Grievance Committeeman are paid for time spent "discuss[ing] the grievance . . . with the aggrieved employee [and] with the Steward." J.A. 44.

found that they were spending full time performing their grievance-related work with little or no time left for their regular production work. J.A. 59-60; *see* J.A. 83. Since the early 1940's, the UAW had dealt with that reality in the automobile manufacturing industry by negotiating collective bargaining agreements which supplement the "as needed" leave for stewards and committeemen with contractual provisions defining a limited number of union grievance-handling positions within each plant as, *de jure*, full-time. J.A. 63.

Beginning in the early 1970's, the UAW and various companies in the agricultural implement industry came to agreements embodying the same approach. The UAW negotiated a provision for full-time employee-grievance handlers with Deere and Company in 1971, J.A. 58; with Caterpillar in 1973, J.A. 58; and with J.I. Case Corp. in 1977, J.A. 63.

Specifically, the 1973 UAW-Caterpillar collective bargaining agreement and each subsequent agreement, in addition to continuing the provisions for leave for stewards and grievance committeeman, provided for the election of an employee to serve as "full-time Chairman" of the grievance committee. J.A. 60. By denominating the position as "full time," the employee elected to be Grievance Chairman—unlike the stewards or committeemen—was allowed to spend the entire working day on grievance processing without the need continually to obtain permission from a supervisor.

Under the 1973 agreement and each succeeding collective bargaining agreement, the Grievance Chairman was paid by the Company "at the regular straight-time hourly rate he was receiving just prior to his election" for all time spent during his "regular shift hours during the regular workweek," J.A. 14, discharging "the functions of his office" as detailed in the agreement, *see* p. 3 *supra*.⁵ The

⁵ By limiting the Chairman's pay to "his regular shift hours," the agreements had the effect of making the Chairman ineligible for any overtime or premium pay. To compensate for this, the parties agreed in 1973, and in each succeeding contract, to provide

agreements expressly provided, however, that the Company would not pay for time spent by the Chairman on union functions "not directly related to the functions of his office," including time spent in "negotiations" and in "attendance at meetings and/or conventions not held in the local union office." J.A. 14.

The collective bargaining agreements went on to provide that during his term of office—which lasts three years—the Chairman "shall be considered to be on a leave of absence." J.A. 14. The Chairman continued to accrue credit under Caterpillar's pension and supplemental unemployment benefit plans, to be covered by Caterpillar's health insurance plan, and to earn vacation, and sick-leave and severance pay credit; in addition, the Chairman was entitled to the same paid leave as other Caterpillar employees, such as temporary military leave, bereavement leave, and jury leave. J.A. 15.

Importantly, the UAW-Caterpillar collective bargaining agreements have never required the Company to pay the wages of any union representatives other than employees elected to these grievance-handling positions. Thus, for example, the salaries of the international union representatives assigned to the Caterpillar locals—including UAW representatives who previously had worked for Caterpillar—are paid by the UAW and not by Caterpillar.

The No-Docking Provisions in Practice—Pursuant to the contractual provisions described above, for almost twenty years Caterpillar consistently permitted each succeeding employee elected Grievance Chairman to devote full time during the regular workday investigating and adjusting grievances, and participating in certain joint labor-management activities as mutually agreed, without

the Chairman with six additional hours of pay per week—the equivalent of four overtime hours at time and one-half pay, J.A. 61. This extra pay is available only for those weeks in which the Chairman "perform[s] the legitimate duties of his office," J.A. 14. (This extra pay was reported on the Chairman's weekly Caterpillar pay stub as four hours of regular pay and two hours of overtime pay. C.A. App. 438.)

loss of pay or benefits. To receive wages from Caterpillar, the Grievance Chairman submitted weekly time cards delineating the hours during his shift that he had performed his contractual functions. J.A. 55.

The Grievance Chairman maintained other employment ties as well. For example, the Chairman continued to be included on Caterpillar's seniority rolls and was listed—by his employee identification number—as an active Caterpillar employee. C.A. App. 435-36, 445. Like any other employee, the Chairman continued to use his employee "gate card" to gain access to the plant. C.A. App. 643. Like any other employee, the Grievance Chairman remained subject to discipline up to and including discharge, if he violated shop rules. C.A. App. 143. And, of course, the Chairman continued to enjoy the right to return to his former position with Caterpillar at any time.

The Grievance Chairman at Caterpillar's York facility at the time of the events that give rise to this action was Terry Orndorff. Mr. Orndorff was hired by Caterpillar in 1969 and for over twenty-one years held a variety of jobs on the factory floor. In 1990 Orndorff was elected by his fellow employees to the position of Grievance Chairman. J.A. 54. To this day, Caterpillar continues to carry Mr. Orndorff on its rolls as an active employee, as it has done since he was first hired in 1969. C.A. App. 711.

During his term of office, Orndorff worked approximately 50-60 hours per week, arriving each day at the local union hall (a mile from the plant) prior to the start of the first shift and working to or beyond the end of that shift. J.A. 84.⁶ The bulk of Orndorff's time was spent investigating and adjusting grievances and in dealing with "situations to try to resolve them prior to them becoming grievances." J.A. 87. Orndorff also participated

⁶ In Caterpillar's large facility in Peoria, Illinois, the grievance chairman works out of an area of the plant designated for his use. J.A. 16. The Union preferred a similar arrangement at the York plant, but the Company would not agree and insisted that the Chairman's office be located at the local union hall. J.A. 60.

in several joint labor-management committees. J.A. 84, 87-88.

Orndorff also performed various union functions that were outside the scope of the duties set forth in the Agreement, including participating in collective bargaining negotiations, attending workers compensation hearings, and traveling to union conferences. C.A. App. 613-14. The Local paid Orndorff for his lost time when he was performing these functions; Caterpillar did not. C.A. App. 613-14. In practice, about half of the weeks Orndorff received full pay from Caterpillar, and half of the weeks less; in total, the Local paid Orndorff roughly one-quarter of his total compensation. J.A. 71-81; C.A. App. 653-55, 705-07.

Caterpillar Discontinues Paying the Wages of the Grievance Chairman—The system as thus described functioned quite smoothly for almost twenty years, from 1973 when it was first negotiated until one year after the 1988 Agreement expired. But on October 30, 1992—in the wake of a national strike and deteriorating labor relations between the UAW and Caterpillar—Caterpillar's Director of Corporate Labor Relations, in an avowed effort to "try to gain leverage in [a] protracted labor dispute," Pet. at 2, wrote a letter to the UAW announcing that "until a new agreement is reached," Caterpillar would no longer pay the lost wages for those positions denominated as full time (but would continue to pay the wages for those handling grievances on an "as needed" basis). J.A. 49 (emphasis added). Attached to Caterpillar's letter was a listing of the affected employees (replete with their Caterpillar badge number and their Social Security number) at each Caterpillar plant. J.A. 49.

In accordance with its letter, on November 17, 1992, Caterpillar discontinued paying the Grievance Chairman's wages for time spent performing his grievance-processing duties. Also true to its letter, Caterpillar continued to propose to the Union, in collective bargaining, a new agreement under which the company would resume paying the Chairman's lost time. C.A. App. 652.

On the date Caterpillar's new policy took effect, the Union filed an unfair labor practice charge with the National Labor Relations Board alleging that Caterpillar had violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) ("NLRA"), by ceasing to pay lost time to the Chairman without bargaining with the UAW over the issue. "In response," Pet. at 2—indeed, the day after the Regional Director of the NLRB notified Caterpillar that he intended to issue a complaint against the Company—Caterpillar commenced this action seeking to preempt NLRB action by obtaining a declaration that the lost time payments to the Grievance Chairman violated § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), and hence that such payments could not be required under NLRA § 8(a)(5).

The district court ruled for Caterpillar. The court of appeals reversed, holding that the "payments at issue here . . . certainly were protected by the first exemption contained in § 302(c)." Pet. App. 10.

SUMMARY OF ARGUMENT

The provisions of the collective bargaining agreement at issue here are an integral component of the grievance-arbitration system that is predominant in industry today and that dates back to the 1930's and 1940's. Indeed, at the time § 302 was enacted such provisions had been mandated by the War Labor Board, blessed by the Department of Labor, and in four of five organized manufacturing facilities employers allowed employees elected to union grievance-handling positions to devote part or all of their time to those functions without loss of pay.

The language of § 302 makes ample room for such agreements. Subsection 302(c)(1), in terms, permits payments "to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." All *bona fide* remunerative payments to employee-union representatives fall within this broad exemption, since all such pay-

ments, if not "compensation for service," at the very least are "by reason of" such service.

The legislative history confirms this conclusion. It shows that § 302 was enacted to limit and regulate other types of collective bargaining provisions but not those allowing employees elected to grievance handling offices to spend time on those functions without loss of pay. Indeed, such provisions were specifically called to the attention of Congress in 1947 and, far from condemning that kind of agreements, Congress recognized its legitimacy.

Sixty-years of experience belies Caterpillar's concern that these agreements threaten the national labor policy. That experience proves that unions which are formed by employees, governed by employees and whose leaders are elected by employees do not surrender their independence by negotiating in collective bargaining for paid leave for employee-union representatives. On the basis of a theoretical concern—rooted in an absolutist conception of what "independence" means—Caterpillar would invalidate vast numbers of collective bargaining agreements and turn the majority of industrial unions, and the employers with which those unions deal, into criminals.

If Congress were to conclude that—despite their long history and wide prevalence—collective bargaining agreements allowing paid leave for employee-union representatives threaten the national labor policy, Congress plainly could regulate such agreements in detail, and, in so doing, could, of course, draw such lines as sound policy were deemed to dictate. That is what the 1947 Congress did in § 302(c)(5) with respect to collective bargaining provisions for employer payments to health and welfare funds. But § 302 was not born out of a Congressional concern over the class of payments made, in the context of an employment relationship, to present or former employees who have been elected or appointed to a union position. And, the plain language of § 302(c)(1) makes that manifest by saving that class of payments from § 302's prohibition.

ARGUMENT

LMRA § 302 DOES NOT MAKE IT A FEDERAL CRIME FOR AN EMPLOYER AND A UNION TO ENTER INTO A COLLECTIVE BARGAINING AGREEMENT PERMITTING EMPLOYEES ELECTED TO A UNION OFFICE TO DEVOTE PART OR ALL OF THEIR WORKING TIME TO THEIR REPRESENTATIONAL RESPONSIBILITIES WITHOUT LOSS OF PAY.

A. The Historical Background

The provisions of the collective bargaining agreement at issue here are in no way novel or unique. Such provisions are, to the contrary, an integral component of the grievance-arbitration system that is predominant in industry today and that dates back to the 1930's and '40s.

At that time, industrial workers began to organize into unions—principally those centered around the Congress of Industrial Organizations ("CIO")—and to negotiate terms and conditions of employment suited to those industries. That innovation in worker organization demanded innovations in industrial relations as well—innovations that would assure that the rights that were being collectively bargained were enforceable and that disputes would be settled without threatening production.

With the familiarity born of experience we tend to assume that the answers that emerged to those labor relations challenges were preordained. But in fact the parties were not guided by any law of nature that dictated a particular process for workplace conflict resolution or a particular role that unions would play in that process. This was unexplored terrain.

In the end, the all but universal conclusion—arrived at through the system of free, arms-length collective bargaining fostered by the NLRA—was the creation of multi-step procedures for adjusting grievances; impartial arbitration procedures to resolve grievances that could not be adjusted; and multi-level systems of in-plant representation through which employees, elected from among their fellows, represented the group in the grievance process from the shop floor on up. These grievance procedures were de-

signed as "devices for maintaining peace and orderly operations in the plant," reflecting the "explicit recognition by labor and management of the need for replacing unrest and dissatisfaction . . . with an agreed-upon framework for disposing of problems arising in the day-to-day relationships between the management and workers."⁷

From the very first, it was understood and agreed—as one of the negotiated features of the grievance process—that insofar as employee-union representatives devoted working time to resolving grievances through this process, that cost would be borne by the employer (at the employees' regular rate of pay) up to the point that a grievance reached arbitration. This was true with respect to the stewards in the plant's departments who devoted relatively small amounts of their time to handling grievances of employees. And, it was equally true with respect to the employees elected to positions at the apex of the grievance procedure—whether denominated as chairman, chief steward or some other title—who, *de jure* or *de facto*, devoted most or all of their time to grievance resolution.

The rudiments of this system can be found in the first collective bargaining agreement between the UAW and General Motors, the first automobile manufacturer to recognize the UAW. That 1937 labor contract, negotiated following a series of sit-down strikes and violent confrontations between GM and its workers at the Flint, Michigan plant,⁸ provided for a "shop committee" in each plant comprised of "not less than five, nor more than nine members in each plant who are employees of the Company," and who were granted the right "to leave their work to investigate or adjust grievances in any department after duly notifying their foreman."⁹ The first

⁷ Bureau of Labor Statistics, *Collective Bargaining Provisions: Grievance and Arbitration Provisions* at 2 (Bull. No. 908-16) (1950).

⁸ See T. Brooks, *Toil and Trouble: A History of American Labor* at 183-85 (1964).

⁹ The text of the 1937 UAW-General Motors contract is reprinted in 1 International Union, United Automobile Workers of America,

UAW-Chrysler collective bargaining agreement, signed later in 1937, likewise allowed "district committeemen" to perform certain duties "without loss of time or pay."¹⁰

The true breakthrough with respect to the system of in-plant representation—as with respect to so many other matters—came four years later, with the negotiation of the first collective bargaining agreement between the UAW and Ford Motor Co. That 1941 labor contract was the culmination of a four-year struggle which had begun in 1937 with the assault on UAW organizers on the overpass of Ford's River Rouge plant as those organizers were seeking to distribute leaflets to Ford employees; the organizing campaign reached a head when the employees at River Rouge went on strike to secure recognition of the UAW after which Ford agreed to an NLRB election in which over 90% of the employees voted for union representation.¹¹

Following that vote, the parties negotiated an "astounding document," in which Ford agreed to match the highest rate paid by its competitors in each job category; pay time-and-one half after eight hours of work in a day or 40 hours of work in a week; pay premium pay for night work and Sunday work; and effect layoffs and recalls in seniority order.¹²

Of particular relevance here, the agreement provided for the first time for shop-floor representation—one steward (denominated a "district committeeman") for every 550 employees; a grievance committee in each building consisting of three committee members per shift; and a "plant committee" comprised of the "building chairman" in each building. And, the agreement provided that these

Agreements Entered into Between International Union, United Automobile Workers of America and Employers in the Automobile and Other Industries at 88 (May, 1937).

¹⁰ 2 *Id.* 30.

¹¹ See I. Bernstein, *Turbulent Years: A History of the American Worker 1933-1941* at 569-71, 734-48 (1970).

¹² Bernstein, *supra*, at 748.

chairmen shall "devote their full time to their duties as such" and "shall receive the same wages which were received by them on their respective jobs at the time they became building chairmen." C.A. App. 295 (emphasis added).¹³

The 1941 Ford Agreement set the precedent for the industry—and for manufacturing generally—in many regards. With respect to the matter at issue here, General Motors and Chrysler soon followed suit. The 1942 UAW-General Motors agreement provided for a steward system (with each steward allowed up to two hours per day of lost time), and a shop committee (with each committeeman allowed four or five hours per day depending on the size of the plant); the chairman of the shop committee was granted the right to "leave . . . work . . . at any time" without loss of pay. C.A. App. 333-35. Chrysler then adopted the same pattern.¹⁴

The thinking underlying the UAW's demand to allocate costs in this way—and the employers' acceptance of that demand—is clear. As Dean Shulman explained in a 1944 arbitration award under the UAW-Ford contract, "in handling grievances, stewards and committeemen are performing a service not merely for the union but for the plant as a whole." *Ford Motor Co.*, *supra* n. 13.

The National War Labor Board, which was created by President Roosevelt by Executive Order to maintain war-time production by providing for compulsory arbitration of labor disputes, see Executive Order 9017 (Jan. 12,

¹³ Interestingly, the 1941 UAW-Ford agreement did *not* in terms provide any pay for committeemen but only for the building chairmen. See C.A. App. 295. By 1944, in addition to allowing each building chairman to "devote his full time to his duties" without loss of pay, Ford agreed to allow the committeemen time off with pay "to handle grievances." See *Ford Motor Co.*, Opinion A-124 (1944), reprinted in H. Sulman & N. Chamberlain, *Cases on Labor Relations* at 24 (1949).

¹⁴ See C.A. App. 376-77 (1943 UAW-Chrysler agreement); see also I. Howe & B. Widick, *The UAW and Walter Reuther* 235 (1949) (reporting that at Chrysler's Detroit plant "the chief steward devotes almost his entire day to his duties as steward").

1942), put the same point this way: "the adjustment of grievances by union representatives with the company representatives is not 'union business,' it is business in which the union and the company are equally interested," *Caterpillar Tractor Co.*, 2 BNA War Lab. Reports 75, 95 (1942), and the "steward's service is as beneficial to the company as to the employee," *Niles-Bement-Pond Co.*, 5 BNA War Lab. Rep. 489, 499 (1943). Such service, therefore, is an "expectable and legitimate industrial cost." *Goodyear Aircraft Corp.*, 13 BNA War Lab. Rep. 65, 74 (1943).

Pursuant to this philosophy, the War Labor Board ordered employers—including Caterpillar itself in the first case just quoted—to agree to contracts under which "union representatives . . . shall be permitted to handle the grievances within the plant without loss of pay," and to "negotiate the [representative's] geographical jurisdiction within the plant." *Caterpillar Tractor*, *supra*, 2 BNA War Labor Report at 95.¹⁵

Reflecting the same basic viewpoint, in 1942, the Wage and Hour Administrator of the Department of Labor, following "discussion with representatives of both industry and labor," ruled that if "labor-management committee meetings" take place "during regular working hours," time spent by an employee-union representative in "attending them is considered hours worked and is, therefore, to be paid for in accordance with the Fair Labor Standards Act." Bureau of National Affairs, *Wage and Hour Manual*

¹⁵ See, e.g., *International Harvester Co.*, 1 BNA War Lab. Rep. 112 (1942); *Tabardrey Mfg. Co.*, 8 BNA War Lab. 346, 351 (1943); *Arthur J. O'Leary & Sons*, 8 NBA War Lab. Rep. 421, 248 (1943); *McQuay Norris Mfg. Co.*, 9 BNA War Labor Rep. 538 (1943); *United States Catridge Co.*, 12 BNA War Lab. 616, 624 (1943); *Goodyear Aircraft Corp.*, 13 BNA Lab. Rep. 65, 74 (1943); *Frank Foundaries Corp.*, 14 BNA War Lab. 229, 231 (1944); *Fairchild Engine & Airplane Corp.*, 16 BNA War Lab. Rep. 633, 646-47 (1944); *Western Electric Co.*, 18 BNA War Lab. Rep. 276, 276 (1944); *U.S. Gypsum Co.*, 18 BNA War Lab. Rep. 682 (1944); *Firestone Tire & Rubber Co.*, 27 BNA War Lab. Rep. 105, 106 (1945); *Aviation Corp.*, 28 BNA War Lab. Rep. 187, 188 (1945); *E.W. Bliss Co.*, 28 BNA War Lab. Rep. 270, 272 (1945).

at 195 (cum. ed. 1944-45). And, in April, 1946, the Administrator clarified the Department's position by ruling that "time voluntarily spent in grievance conferences during regular working hours pursuant to the established grievance machinery in the plant is considered to be hours worked under the [FLSA] irrespective of whether the conference is held with a company representative or with a union representative." Bureau of National Affairs, *Wage and Hour Manual* at 45:291 (cum. ed. 1949).

The practice of negotiating collective bargaining agreements which provided for a grievance procedure, a system of in-plant representation, and paid leave for the employee-union representatives rapidly became the norm. A 1944-45 study conducted for the War Labor Board by the Bureau of Labor Statistics—which surveyed 101 large plants covering "each of the principal manufacturing industries"—found that "in four out of five plants management compensated union representatives for time spent in handling grievances during working hours," with "[t]wo thirds of tho[se] firms . . . set[ting] no specific limit on the time so spent." ¹⁶

The approach whereby employers compensate employee-union representatives for grievance-adjustment time has remained an integral part of the grievance system in industrial workplaces for more than fifty years. According to the most recent study by the Bureau of Labor Statistics on this subject, such "no-docking" provisions are found in over 90% of all collective bargaining agreements negotiated by the UAW, and in more than 80% of the agreements in the "transportation equipment, electrical machinery, nonelectrical machinery, chemicals, ordnance, furniture and fixtures, communications and utilities" industries.¹⁷

¹⁶ Bureau of Labor Statistics, *Grievance Procedures Under Collective Bargaining* at 1 n.2, 10 (1946); see also Bureau of Labor Statistics, *Union Agreement Provisions* at 152-53 (1942).

¹⁷ Bureau of Labor Statistics, *Major Collective Bargaining agreements: Employer Pay and Leave for Union Business* at 7 (1980).

In a brief *amicus curiae* (at 18), the Council on Labor Law Equality contends that the BLS 1980 study indicates that em-

It is Caterpillar's thesis here that this deeply rooted collective bargaining practice—which was so widely prevalent when the Labor Management Relations Act of 1947 (LMRA) was enacted and which is no less prevalent today—is, through § 302 of that Act, rendered not just unlawful but criminal. According to Caterpillar, Congress enacted that section to protect employees from making a “shortsighted” decision to “approve of” collectively-bargained no-docking provisions in the belief that allowing employee-union representatives time off with pay is a “corrosive practice[] risking the growth of conflicting interests, undue influence, and the loss of a proper balance of financial independence from management and dependence upon members.” Pet. Br. at 11.

The congressional determination that Caterpillar would find in § 302 is not, in fact, there. Nothing in the language or legislative history of § 302 supports Caterpillar's claim. And, while Caterpillar professes concern for the health of our system of labor-management relations, over fifty years of experiences belies Caterpillar's hypothesis that lost time payments to employee-union representatives threatens the integrity of that system. What Caterpillar is attempting here is to remake § 302 to fit

employees elected to full-time union positions “are usually not paid by their employer.” In fact, what the study shows is that, in addition to providing for paid leave for grievance handlers—which leave may be part-time or full-time—collective bargaining agreements also typically provide for unpaid union leave for employees elected as, e.g., local union president or employees hired to be a national union representative. See *Employer Pay and Leave for Union Business*, *supra*, at 20. The study also shows that with respect to various fringe benefits, such as pensions, employees granted unpaid leaves to hold union office are “often continued . . . as though the employee remained on active duty.” *Id.* at 23. Thus, even with respect to unpaid leaves for union business, the practice is still for employees to receive a “thing of value” from the employer.

The UAW-Caterpillar agreement follows this pattern: it authorizes unpaid leave to “[a]ny employee who is elected or appointed to a position with the Union,” and provides that “seniority shall continue to accrue” during such unpaid leave. C.A. App. 62.

its “shortsighted” effort to gain what the Company itself has stated is “leverage” in its current dispute with the UAW, p. 7 *supra*. That effort should be rejected.

B. The Statutory Language

The proper “starting point” in statutory construction is, of course, “the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Id.* And, that rule applies with special force to a criminal statute like § 302 which must give “‘fair warning . . . to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994).

1. Section 302 is in two basic parts. Subsections (a) and (b) are prohibitory; in particular, subsection (a)(1) states that:

It shall be unlawful for any employer . . . to pay . . . or agree to pay . . . any money or other thing of value—(1) to any representative of any of his employees . . .¹⁸

But subsections (a) and (b) are in turn qualified by subsection (c) which, as enacted in 1947, stated that the “provisions of this section shall not be applicable” to five classes of payments by an employer to a representative of his employees.¹⁹

¹⁸ Section 302(a) continues with a prohibition on payments to a labor organization; a prohibition on paying employees “in excess of their normal compensation” to cause the employees to influence other employees in the exercise of their rights to organize and bargain; and a prohibition on payments to a union officer if made “with intent to influence him in respect to any of his action” as a union officer. Section 302(b) goes on to prohibit any person to request or receive a payment prohibited by subsection (a).

The full text of § 302 is reprinted as an Appendix to this brief.

¹⁹ Since 1947, four more exemptions have been added to § 302(c) as subsections (c)(6)-(9); none of these is directly applicable here.

The last two paragraphs of the original subsection (c)—subsection (c)(4) & (c)(5)—permit under carefully-defined circumstances, payments of union dues withheld from workers' pay to unions and contributions to jointly-trusted health and welfare funds. As we shall see, these two categories of payments were the focus of congressional attention in 1947.

The first three clauses of subsection (c), in contrast, are more categorical in nature, providing that the §302(a) & (b) prohibitions shall *not* apply with respect to payments in satisfaction of judgments (subsection (c)(2)), with respect to payments pursuant to a sale made in the regular course of business (subsection (c)(3)), and, of direct relevance here:

(1) in respect to any money or other things of value payable by an employer . . . to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; . . .

As Caterpillar correctly notes, Br. at 14, throughout this litigation the parties have agreed that "the payments at issue here come within th[e] broad prohibition" contained in § 302(a), and that the determinative question is therefore whether the payments at issue are permitted by subsection (c)(1). It is our submission, which we develop below, that subsection (c)(1) exempts from the reach of this criminal statute (and leaves to other regulatory regimes) all *bona fide* remunerative payments to employee-union representatives rooted in the employment relationship.

2. At the threshold, the marked contrast between the structure of subsection (c)(1) on the one hand, and sub-

although the last exemption—for payments to a "labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978 [P.L. 95-524, 29 U.S.C. § 175a]"—surely suggests that Congress does not condemn all employer payments to individuals performing a role like that of the Grievance Chairman here.

sections (c)(4) and (c)(5) on the other, is of significance in itself. The latter two subsections are in the nature of regulation; the exemption from criminal liability is qualified by provisos—three separate provisos in the case of subsection (c)(5)—defining with particularity the limits of the behavior Congress deemed permissible. Subsection (c)(1), in contrast, contains no such regulatory provisions; it is a blanket exemption and its draftmanship—covering money payable to either "an employee *or* former employee" and payable either "as compensation for, *or* by reason of, his service"—evinces an intent to cover, without limitation, the *universe* of remunerative payments to an employee-union representative.²⁰

The words of the statutory text confirm that the payments at issue here fall within the exemption stated in subsection (c)(1).

(a) There is no doubt that the Grievance Chairman is within the class of persons to whom § 302(c)(1) permits payments. Under the collective bargaining agreement, the Chairman must be elected "from among employees in the bargaining unit," p. 2 *supra*, which means that at a minimum, the Grievance Chairman is a "former employee" of Caterpillar.

Furthermore, the collective bargaining agreement provides that the Grievance Chairman is "considered on leave" and has a right to return to the bargaining unit at the expiration of his term of office, p. 5 *supra*. As a result—and notwithstanding Caterpillar's assertion to the contrary, *see* Pet. at 3 n.1—the Chairman remains an "employee" of Caterpillar while on (or while "considered on") leave since the term "employee," by definition, "include[s] persons on temporary or limited absence from

²⁰ As the statutory language makes plain, Caterpillar is simply wrong in asserting that subsection (c)(1) rests on the premise that "service as an employee and service as a union representative" are "mutually exclusive." Pet. Br. at 29.

work, such as employees on military duty," *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 172 (1972).²¹

In any event, whether considered a current employee or only a former employee, it is undisputed that the payments to the Grievance Chairman are lawful if "payable as . . . compensation for, or by reason of," the Grievance Chairman's "service as an employee or former employee" of Caterpillar.

²¹ *Pittsburgh Glass* involved the meaning of the term "employee" as used in § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2). The term "employee" as used in § 302 has the same meaning by virtue of LMRA § 501, 29 U.S.C. § 142(3), which expressly so provides. And, while the statement quoted in text from *Pittsburgh Glass* is a *dictum*—the issue in that case was whether retirees, who are not on leave, are "employees"—the National Labor Relations Board has held from the first that individuals who are on leave from their place of employment remain "employees" within the meaning of NLRA § 2(2). See, e.g., *Soconoy Vacuum Oil Co.*, 11 NLRB 28, 34 (1939); *International Shoe Co.*, 14 NLRB 1140, 1144 (1939). See also 1 P. Hardin (ed), *The Developing Labor Law* 420 (3rd ed. 1992).

The court of appeals thought that the fact that the Grievance Chairman, during his term of office, does not "perform[] services for the benefit and under the control of the employer," means that the chairman "cannot be considered [a] current employee[] of Caterpillar." Pet. at 7a. But, by definition, an employee on full-time leave for any purpose is not subject to such control by the employer during the leave, and while that fact would be relevant if the question here were Caterpillar's liability for the acts of the Chairman, the employer's relative lack of control of an on-leave employee is not relevant in determining whether the employment relationship has terminated. Indeed, if individuals who go on leave forfeited their status as employees, such individuals would not enjoy any rights under the NLRA (since NLRA § 7 confers rights only on "employees") or under a host of other federal employment laws, including the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq; the American with Disabilities Act, 29 U.S.C. §§ 706 et seq; and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq.

We do not pursue the point further because, as noted in text, the Chairmen in any event are "former employees" and thus their status as current employees *vel non* ultimately is beside the point.

(b) "Compensation" has a well-established meaning. *Black's Law Dictionary* (at p. 256, 5th ed.) defines compensation as "remuneration"; it is that which is received in return for service. And, this Court has made clear that the term is "broad enough to include . . . any economic or financial benefit conferred on the employee" in return for service. *Commissioner v. Smith*, 324 U.S. 177, 181 (1945) (emphasis added).

Compensation thus encompasses not only a wage, salary, or other cognate cash payment that is made contemporaneous with the employee's service and that bears a one-to-one correspondence with such service but also payments in forms other than cash (such as payments in-kind), and payments at times other than the present (such as a year-end bonus or deferred compensation). And, the phrase "compensation for service" also encompasses pay for hours not worked—such as backpay—as "service" means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Security Board v. Nierotko*, 327 U.S. 358, 365-66 (1946).

Of particular relevance here, the "total compensation package" is universally understood to consist not only of "direct pay" but also "fringe benefits," including "time-not-worked benefits and security and health benefits."²² Indeed, in a variety of contexts, this Court has treated such fringe benefits as part of an employee's "compensation." See, e.g., *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 210 (1991) ("severance pay . . . viewed as a form of deferred compensation"); *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 808 (1989) (retirement benefits "deferred compensation for past years of service rendered"); *Foster v. Dravo Corp.*, 420 U.S.

²² E. Herman, A. Kuhn, R. Seeber, *Collective Bargaining and Labor Relations* 199 (2d ed. 1987). To "arrive at the total cost of an agreement," employers "calculate the many different financial components" that go into the "total compensation package." *Id.*

92, 100 (1975) (vacation benefits "a form of short-term compensation for work performed"); *United States v. Carter*, 353 U.S. 210, 217-18 (1957) (contributions to a health and welfare fund for each hour an employee worked "was a part of the compensation for work . . . done").²³

Some of these fringe benefits, while paid at a different point in time than wages, are indistinguishable from wages in that, like wages, the benefits are tied directly to the amount of work performed. For example, an employee may, for each week worked, earn a fixed number of hours of paid time-off (i.e. vacation) or a fixed number of paid sick days.

But there are other types of "time-not-worked benefits" which employers typically promise in return for employee service and which do *not* bear a one-to-one relationship to the work performed. The "distinguishing feature" of these benefits is that "they accumulate over a period of time and are payable only upon the occurrence of a contingency." *Massachusetts v. Morash*, 490 U.S. 107, 115-16 (1989).

Most often the contingency that triggers such "time-not-worked" benefits is one "outside of the control of the employee." *Id.* For example, an employer may agree to pay benefits to an employee who becomes temporarily or permanently disabled, or who is required to care for a dependent family member. The employer may likewise pay an employee called for jury duty. Or, an employer may agree to pay supplemental unemployment insurance to an employee who is laid off. In all these instances, the employee is off work involuntarily.

Employers also provide "time-not-worked" benefits—that is, paid leave—to employees who satisfy conditions that are *within* the employee's control. For example, some employers grant paid leave to employees enrolled in edu-

²³ Cases like these prove that Caterpillar is simply wrong in asserting, Pet. Br. at 21, that the term "compensation" is limited to wages (and excludes "fringe benefits").

cational programs, either on a part-time or full-time basis. Employers may also grant paid leave to employees who choose to perform certain civic or social responsibilities. And, as we have seen, unionized employers typically provide paid leave for an employee elected to a part-time or full-time union position within the shop.

As Judge Kearsse wrote in her opinion for the Second Circuit in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046, 1049 (2d Cir. 1986), "time off to . . . tend to union duties . . . is not . . . different in kind from . . . sick leave, military leave, or jury leave" and there is no "principled distinction" which would justify excluding payments for union leave from payments permitted by the "exemption provided by" § 302(c)(1). The only possible point of contention, then, is whether *all* of these forms of paid leave—because they entail payments which are not tied directly to the hours worked as an employee performing service for the employer—fall outside the permission stated in § 302(c)(1) and thus are unlawful when afforded to an employee-union representative (or former employee-union representative). As we now show, this kind of paid leave is within—not outside of—that permission.

(c) If subsection (c)(1) authorized only payments "as compensation for . . . services as an employee," there could be room for disagreement. On the one hand, an employee qualifying for a contingent "time-not-worked" benefit—be it severance pay, educational leave, or union leave—rendered prior service to the employer under an agreement providing that the employer would pay the benefit should one of the contingencies arise, and that understanding was part of the *quid pro quo* for the employee's prior labor. That provides the strongest basis for viewing such pay as "compensation for" the employee's prior service.

Indeed, in *Bingler v. Johnson*, 394 U.S. 741 (1969), this Court held that "stipends" paid by an employer to an employee granted a full-time "educational leave of absence" for up to a year and in an amount equal to 90%

of the employee's salary were "taxable 'compensation' rather than excludable 'scholarships,'" *id.* at 756 (emphasis added). Writing for the Court, Justice Stewart observed that "[t]he employer-employee relationship involved is immediately suggestive . . . as is the close relation between the [students'] prior salaries and the amount of their 'stipends.'" *Id.* at 756-57. The "grants are fully bargained for and in the nature of compensation," whether viewed as "deferred" compensation or "anticipatory payments" for future services to be rendered. *Id.* at 757 n.31.

To be sure, the first clause of § 302(c)(1) speaks not of "compensation" *simpliciter* but rather of "compensation . . . for his service." That formulation leaves room to argue that the words "for his service" are words of limitation which gives the phrase a narrower meaning than the term "compensation" as used in *Bingler*. On such a reading, "compensation . . . for his service" would exclude those "time-not-worked" benefits—like disability leave, educational leave, or union leave—which are contingent in nature and which do not accord with "some . . . principle of proportionality" between the work previously done and the money paid out. *Pet. Br.* at 30.

It is not necessary to decide here which is the better view of the phrase "compensation for service." For the permission contained in § 302(c)(1) is *not* limited to such payments. Rather, § 302(c)(1) covers any "money or other thing of value payable . . . as compensation for, or by reason of, [the employee-union officer's] service" as an employee.

"Because the statute is written in the disjunctive," the underlined phrase must, under settled rules of statutory construction, be given "separate meaning." *Garcia v. United States* 469 U.S. 70, 73 (1984). Congress went beyond an exemption for money payable as "compensation for service"—itself a broad class—to exempt as well payments "by reason of" service. *Black's Law Dictionary*

(at 182, 5th ed.) defines "by reason of" to mean "because of."

And, the breadth of the statutory phrase taken as a whole—payments "to an employee or former employee . . . as compensation for, or by reason of his service"—evinces an intent to cover, without limitation, the *universe* of *bona fide* remunerative payments made by an employer to its employees, whether or not the particular payment is tied to a proportional quantum of employee service.

(d) Of course, a payment to an employee-union representative may in form be remunerative in nature but in fact be "merely a sham," *Arroyo v. United States*, 359 U.S. 419, 424 (1959—the recipient's status as an employee or former employee may, in other words, be seized on as a pretext to make payments unrelated to the employment relationship. And, *Arroyo* makes plain that such "sham" payments cannot claim immunity under any of subsection (c)'s exemptions.

But no claim has been or can be made that collectively-bargained provisions which allow an employee who is elected to a particular union position (here Grievance Chairman) to receive a lost time payment which, in form and amount, is comparable to payments made to employees who hold no union office (here continued wages and benefits at the employee's regular rate), and to receive such payments regardless of how the individual performs his union responsibilities is a "sham." Rather, such payments, if not "compensation for service" are surely "by reason of" such service and hence fall within § 302(c)(1).²⁴

²⁴ In dissent below, Judge Alito argued that "by reason of" means "a major cause" rather than "a 'but-for' cause," *Pet. App.* 35a, and that therefore the continued wage payments to the employee elected Grievance Chairman are not "by reason of" that employee's service even though "[t]he chairmen's prior service as employees of Caterpillar rendered them eligible to receive their Caterpillar salaries if they were elected as Chairman," *Pet. App.* 38a. The argument fails on three grounds.

First, the dictionary definition of "by reason of," which Judge Alito quoted, *Pet. App.* 34a, is "because of" or "on account of";

3. Caterpillar proposes an entirely different reading of § 302(c)(1). Caterpillar suggests that the “plain language” of § 302(c)(1) “only permits the employer to pay what is due to the employee *in spite of, not because of*, his position as a union official.” Pet. Br. at 10 (emphasis in the original); *see also* Pet. Br. at 21. As a policy proposition, Caterpillar’s proposal is debatable. But the task here is not to make policy but to construe a statutory text. And, it strains the English language far beyond the breaking point to read the phrase payments “as compensation for, or by reason of, service as an employee” to mean payments “in spite of service as a union representative.”

Indeed, when all is said and done not even Caterpillar is prepared to stand by the interpretation of § 302(c)(1) that the Company posits. For if that section permits only payments made “in spite of . . . service as a union representative” then it would be unlawful for an employer to pay any “money or other thing of value” to an employee

nothing in the dictionary equates “by reason of” with “a major cause.”

Second, Judge Alito’s reading of “by reason of” would read that phrase out of the statute, since it is impossible to conceive of a situation in which an employee’s service is the “major cause” of an employer’s payment to the employee but in which the payment would not be classified as “compensation for” that service. Indeed, the core examples Judge Alito offered to give content to his definition of “by reason of” are instances of deferred proportional compensation pure and simple (e.g. vacation pay).

Third, even if Judge Alito’s “major cause” premise were sound, his conclusion would not follow. On Judge Alito’s approach, no contingent “time-not-worked” benefit promised to employees who render service to the employer are payable by reason of that service since for each the “major cause” is the contingency. Put simply, if the paid leave for employee-union representatives is by reason of service in union office rather than employee service, so, too, disability pay is by reason of the disability rather than by reason of employee service and jury pay is by reason of jury service rather than employee service. Surely every employer paying such benefits—and every employee receiving them—understands the employment relationship to be at least a “major” reason why the payments are being made.

who holds a part-time union position—a shop steward, for example—for time spent away from his job performing his duty as a steward. Such payments are made “because of”—not in spite of—the individual’s status as a steward and thus would be unlawful under the interpretation of § 302(c)(1) Caterpillar champions. Yet Caterpillar itself has continued to allow stewards and committeemen time off “as needed” without loss of pay to attend to their union responsibilities. And, Caterpillar concedes that such payments are permissible under § 302(c)(1).²⁵

Caterpillar’s efforts to do business with the statutory language are thus unavailing. The payment of regular wages to an employee or former employee in a paid-leave status provided for in an employer’s compensation package, including a union leave, are “compensation for, or by reason of, his service as an employee,” and thus are permitted by the plain terms of § 302(c)(1).

C. The Legislative History

The legislative history of LMRA § 302 confirms this conclusion. By 1947, when § 302 was enacted, the practice of negotiating collective bargaining agreements allowing employees elected to a union grievance handling office to spend some or all of their time on union business without loss of pay was not only well-established and widely discussed, *see pp. 10-15 supra*, but was specifically called to the attention of Congress. Section 302 was enacted to limit and regulate other types of collective bargaining provisions, but not this type.

²⁵ Caterpillar attempts to escape from the contradiction its interpretation of § 302(c)(1) creates by proposing to harmonize that section with the proviso to—but not the body of—§ 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2). We treat with Caterpillar’s reliance on § 8(a)(2) *infra* at 39-41. For present purposes it suffices to note first, that the payments Caterpillar continues to make would not survive Caterpillar’s own reading of § 8(a)(2); and second, that Caterpillar’s reach for such an extrinsic aide demonstrates that the Company’s reading of the plain language of §§ 302(c)(1) cannot stand on its own two feet.

1. The legislative history of LMRA § 302 begins in 1946 with a bill proposed by President Truman to provide for fact-finding boards to investigate major labor disputes. H.R. 4908, 79th Cong., 1st Sess. (1946). On the floor of the House, Representative Case offered an alternative proposal, H.R. 5262, 79th Cong. 1st Sess. (1946), which was adopted as a substitute for the Truman bill. 92 Cong. Rec. 1070 (1946).

The Case bill became the "direct antecedent" of the LMRA. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962). That bill contained, *inter alia*, the first version of the contract enforcement section ultimately enacted as LMRA § 301, 29 U.S.C. § 185, and of the secondary boycott cause of action ultimately enacted as LMRA § 303, 29 U.S.C. § 187. Significantly, however, the original Case bill did *not* contain any analogue to what is now § 302.

After passing the House, the Case bill was referred to the Senate Labor Committee which struck out all of the provisions Rep. Case had added and reverted to the original Truman bill. *See* S. Rep. 1177, 79th Cong. 1st Sess. (1946). Senators Ball, Taft, and Smith filed a minority report advocating six amendments, also including a version of what eventually became § 301 and § 303. *See* S. Rep. 1177, *supra*, Pt. 2, at 10-17. Again, there was no analogue to § 302 in the Republican minority's proposal.

While the Labor Committee bill was awaiting Senate consideration, the United Mine Workers ("UMW"), under the leadership of John L. Lewis, commenced a national coal strike whose principal purpose was to obtain a collective bargaining agreement requiring the mine operators to pay to the UMW, for its use in providing health and welfare benefits to miners, a royalty on each ton of coal mined. That strike—which wreaked havoc on the economy—"caused the Congress to act." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

Seven weeks into the strike, the Senate suspended work on its pending business to take up the Labor Committee's bill. 92 Cong. Rec. 4806; *see id.* at 4697-4704. Senator Harry Byrd of Virginia immediately offered an amendment, *id.* at 4809, whose purpose, he said, was to "decide the issue between John Lewis and the coal operators" by "prohibit[ing] a union from exacting a royalty on production," *id.* at 4699. Section 302 "had its origin in [the] . . . amendment . . . proposed by Senator Byrd." *Arroyo v. United States*, 359 U.S. at 425 n.6. Indeed, of particular relevance here, the language of § 302(c)(1) is derived *in haec verba* from the Byrd amendment.

The Byrd amendment triggered a two-week long debate which ended only after a cloture petition was filed. 92 Cong. Rec. 5499. The focus of that debate was on the legitimacy of union-controlled welfare funds and the propriety of federal regulation on that subject.²⁶ "Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 572 (1982); *see also Arroyo v. United States*, 359 U.S. at 425-26.

Significantly for present purposes, nowhere in the debate is there even a hint of any concern over, or attempt to restrict collective bargaining agreements providing for the continued payment of lost time wages to an employee elected to a union office. Indeed, Senator Byrd described

²⁶ *See, e.g.*, 92 Cong. Rec. 4891 (Sen. Byrd) (Byrd amendment is "for the purpose of prohibiting the payment of royalties to labor unions, which is the issue in the dispute between the coal miners and the coal operators"); *id.* at 5345 (Sen. Ball) (Byrd amendment "does only one thing—that is, it prevents this one-way street of the employer putting up all the money and the officials of the union spending it at their own discretion").

the thrust of his amendment in terms inconsistent with any such intent, stating that § 8(2) of the Wagner Act proscribed "any contribution by an employer to his employees *over and above their wage*," 92 Cong. Rec. 4893 (emphasis added), and that the Byrd amendment likewise "endeavor[ed] to strike at the attempt of representatives of labor to obtain payments from employers *in excess of salaries paid their employees*," *id.* at 4892-93 (emphasis added). And, with the brief exceptions noted in the margin, no mention was made of the "compensation for or by reason of" language whatsoever.²⁷

The Byrd amendment (and various of the amendments that Senators Ball and Taft had proposed in their minority report) were adopted by the Senate. 92 Cong. Rec. 5739. The House acquiesced in the Senate's changes, *id.* at 5946, but the bill was then vetoed by President Truman, and the House narrowly failed to override the veto, *id.* at 6674-78.

2. At the start of the next Congress, Senator Ball introduced a series of labor law bills including one, S.55, 80th Cong. 1st Sess. (1947), which paralleled the Case bill and included (in § 201) a provision which was a slightly modified version of the Byrd amendment. When the Senate Labor Committee commenced its hearings on these and

²⁷ In his statement explaining the amendment, Senator Byrd stated that "[i]n some instances an employee will also be a labor representative, and there should be no prohibition from paying him his compensation for, or by reason of, his service as an employee." 92 Cong. Rec. 4891. This explanation restates the statutory text.

Senator Pepper, the leader of the opposition, suggested early in the debate that the Byrd amendment "goes entirely too far and would prohibit a railroad employer from paying money to a union for use in supporting a worker 'injured by your railroad.'" *Id.* at 4898. Senator Ball took the floor and responded: "Mr. President, that would be compensation payable by reason of the employee's services as an employee." *Id.* (emphasis added). This colloquy constitutes the only direct reference to the "by reason of" language and indicates that its proponents viewed that language as permitting payments that are not directly proportional to work actually performed.

other bills, Senator Ball explained that this latter proposal "was written in on the floor last year on an amendment offered by Senator Byrd" and "concerns so-called welfare funds which are being demanded by unions in increasing volume in collective bargaining." *Hearings on Labor Relations Program Before the Senate Committee on Labor and Public Welfare*, 80th Cong. 1st Sess. 12 (1947) ("1947 Hearings").

The Senate Committee reported a bill which to a large extent embraced the Ball bills. The Committee bill did *not*, however, include the Byrd amendment or any such provision. But on the floor of the Senate, Senator Ball re-offered his version of the Byrd Amendment and, after brief debate, that amendment was adopted.²⁸

As in 1946, the only collective bargaining practice that was specifically identified as the target of the Ball/Byrd amendment was collective bargaining agreements authorizing union-controlled welfare funds.²⁹ And, also as in 1946, there is no hint of any intent to regulate collective bargaining agreements authorizing the payments of lost time to employee-union representatives elected to part-time or full-time union office. Indeed, as in 1946, with

²⁸ See 2 National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947 at 1302, 1304-23 (hereinafter "Leg. Hist.").

Senators Taft and Ball had filed supplemental views to the Committee report in which they advocated, *inter alia*, adding § 302 to the Committee bill; they labeled their proposed amendment a "limitation on abuse of welfare funds" and explained that it was "similar to the section in the Case bill" and that the "necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers." S. Rep. 105, 80th Cong. 1st Sess. at 52 (1947), reprinted in 1 Leg. Hist. at 458.

²⁹ See, e.g., 2 Leg. Hist. at 1305 (Sen. Ball) ("the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds") (emphasis added); *id.* (Senator Byrd) ("the amendment . . . has a specific purpose which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions"); 2 *id.* at 1312 (Sen. Taft) ("[t]he purpose is to prevent the abuse of welfare funds").

the exception of another brief reference, § 302(c)(1) received no mention whatsoever.³⁰

In conference, the House accepted the Ball amendment. One important change was made, however: a new exemption was added, as subsection (g), saving preexisting welfare funds from the limitations contained in subsection (c)(5) and permitting such funds to continue as union-controlled entities. *See* 2 Leg. Hist. at 1544 (Sen. Taft).

3. The absence of a word of congressional condemnation of collective bargaining agreements allowing part-time or full-time employee-union representatives to perform their responsibilities without loss of pay is especially telling because such agreements were specifically brought to the attention of Congress in its comprehensive examination of labor relations and labor law in 1947. Indeed, this topic was raised on the very first day of the Senate Labor Committee's hearings by the very first witness (following a courtesy appearance by the Secretary of Labor), Professor Leo Wolman.

The focus of Professor Wolman's testimony was on a bill Senator Ball had introduced to amend the Wagner Act. *See* S. 360, 80th Cong. 1st Sess. (1947). Among the changes proposed by that bill was the addition of a proviso to the remedial section of the Wagner Act stating that "no order [of the NLRB] shall require any action by an employer with respect to any labor organization which under similar circumstances would not be required with respect to a labor organization national or international in scope." S. 360, *supra*, at 14. Professor Wolman strongly supported that proposal.

In explaining his support, Wolman argued that the NLRB was applying a double standard when it came, *inter alia*, to the matter of payment of wages to employee-

³⁰ In describing his amendment Senator Ball summarized subsection (c)(1)'s legislative language in short-hand terms as allowing payments "on account of wages actually earned." 2 Leg. Hist. at 1304.

union representatives. According to Wolman, in the case of national unions, but not in the case of nonaffiliated (i.e. company-specific) unions, the Board was of the view that "when union officials are paid by employers, that practice is not considered to be domination." 1947 Hearings at 98. In Wolman's view, "there are very few unions in the United States which would survive today on their present scale and carry on their activities unless the employers paid a considerable part of the union's expenses." *Id.* Wolman continued:

I was just reading in the newspaper that the Chrysler Corporation is negotiating a new contract with the UAW. One of the company's demands was that it no longer be required to pay wages to union stewards for union work. These payments amount currently in Chrysler to about \$300,000 a year.

* * *

SENATOR BALL: Dr. Wolman, did you mean that in this Chrysler contract instance, the company was required to pay the salary of the union stewards?

DR. Wolman. Yes.

SENATOR BALL: *While they were devoting most of their time to union business; is that right?*

DR. WOLMAN: Yes. *And it is a very limited amount of time that they give to anything but union business.* It is also one of the frequent demands of unions that the number of such officials be increased. [1947 Hearings at 99; emphasis added]

Senator Ball returned to this topic at the very end of the Senate hearings. When Gerald Reilly, a former NLRB member and an advisor to Senator Ball in drafting Ball's bills testified, the Senator noted the testimony about Chrysler Corp "pay[ing] . . . union stewards . . . salary and time spent on union business" and asked whether the Labor Board had ever ruled on "whether that is a violation of section 8(3)." ³¹ 1947 Hearings at 2051. Reilly

³¹ That Senator Ball asked only about a potential violation of NLRA § 8(3)—the anti-discrimination provision of the Wagner

answered by referencing "the first Ford contract . . . with the UAW union"—the seminal, 1941 contract which had, in terms, permitted "building chairmen" to "devote their full time to their duties as such," p. 13 *supra*—and stated:

That contract set a precedent throughout the automobile industry. The offhand judgment of the Board at that time was that it was pretty close to being financial support. No one ever filed any charge against the union. So the matter never was adjudicated.

The theory is that if a steward is working on grievance work during working hours he is entitled to do so without loss of pay. The statute says that under regulations provided by the Board that may be done. Now, the Board has never written any regulations on that point. So it is quite conceivable that the whole practice is illegal. In view of the rather rapid development and the abuses, it might be proper for Congress to indicate applicable regulations on that whole problem of paid stewards. [1947 Hearings at 2051; emphasis added]

Senator Morse—who as a Member of the War Labor Board had authored the first decision requiring pay for employee-union representatives, *see International Harvester, supra* n.15—responded with the well-understood rationale for the practice: when a steward "is functioning on settlement of grievances on the job he is working for employers too" and, if effective, "would probably save the company tremendous sums of money." 1947 Hearings at 2052. Reilly readily agreed that "it is all right when the steward is working *full time* on settlement," but went on to take issue with "lots of situations" in which "the contract rather arbitrarily provides for there being a certain number of stewards who do not have any other duties than handling grievances." *Id.* (emphasis added).

Act—and not about § 8(2) underlines how far reality Caterpillar is here in its insistence that the payments Chrysler was making to UAW stewards make the UAW a company-dominated union within the intendment of § 8(2).

4. Notwithstanding Mr. Reilly's suggestion that Congress go beyond the bills then before the Labor Committee (including the Ball bill containing what became § 302) and enact "applicable regulations on that whole problem of paid stewards"—and notwithstanding the fact that, shortly after his testimony, Reilly became the Senate Labor Committee's Special Counsel³²—neither the Committee nor the Senate chose to take up this invitation. Indeed, there is no evidence that even a single Senator or Representative desired to do so.

Instead, the Labor Committee focused on the "double standard" Professor Wolman had identified and broadened the proviso Senator Ball had proposed to NLRA § 10(c) so as to limit not only the NLRB's remedial authority but also to require the Board "in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases" to proceed "irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Senator Ball explained that the point was "to treat affiliated and nonaffiliated independent unions exactly the same." 2 Leg. Hist. at 1103.

The House in 1947 would have gone even further in the same direction. The House passed a bill that would have relaxed § 8(a)(2)'s prohibition on financial support so as to apply only to corruptly-motivated payments. H.R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. at 177. And, while the House conferees acquiesced in the Senate's decision not to amend § 8(a)(2) proper, they did so on the understanding, articulated in the House Managers Statement accompanying the Conference Report, that the Senate amendment to § 10(c)—which was broader than the House analogue—would "*allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant as well.*" H.R. Rep. 510, 80th Cong. 1st Sess.

³² Reilly, *The Legislative History of the Taft-Hartley Act*, 29 G.W. L. Rev. 285, 294 n.14 (1966).

at 40, 1 Leg. Hist. at 544 (1947) (emphasis added).³³
The House conferees explained:

The House bill amended section 8(2) . . . for the purpose of according some protection to labor organizations which were not affiliated with one of the national or international labor organizations. This provision of the House bill had the effect of permitting an employer to do the same kinds of things for independent unions which the Board has permitted him to do for the affiliated unions.

. . . The Board has, for example, in the case of affiliated unions permitted employers to provide bulletin boards in their plants for the union's use, to give union officials preferred treatment in laying off workers and calling them back, *and to allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant.* The Board has not permitted the employer to do the same things for nonaffiliated unions, and it was the purpose of the House provision to provide for equality of treatment in this respect.³⁴

³³ The House bill, like the original Ball bill, see p. 32 *supra*, had provided that "No order of the Board shall require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope." 1 Leg. Hist. at 196. As thus drafted, this provision of the House bill limited the NLRB's remedial authority but did nothing more. The Senate language—limiting the NLRB in issuing complaints and in adjudicating cases—went further and satisfied the House conferees.

³⁴ In the House Labor Committee report which had accompanied the bill reported to the floor, the Committee had stated that "[e]mployer generally provide in their plants bulletin boards for the union's use, give union officials preferred treatment in laying off workers and in calling them back, and allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant." H.R. Rep. 245, 80th Cong. 1st Sess. at 28-29 (1947), 1 Leg. Hist. at 319-20. The House Committee expressed the view that "day-to-day relations between employers and unions require"

Since this matter is adequately dealt with in the provisions in sections 9 and 10 [of the Senate bill], the conference agreement omits the provisions of the House bill . . . [H.R. Rep. 510, *supra*, at 40-41, 1 Leg. Hist. at 544-45; emphasis added]

5. The lessons that emerge from the legislative history are these:

First, nothing in the extensive debate over the Byrd amendment in 1946, or the more truncated debate over the Ball amendment in 1947, evidences an intention to uproot—much less criminalize—the pervasive practice of the parties, in collective bargaining agreements, to provide that employee-union representatives are to be paid lost time wages for grievance handling and cognate union representational activity. What Congress feared in 1947 was unions like the UMW that were too strong, not unions that were too beholden to management. The evil against which § 302 was aimed was thus agreements providing for union-controlled welfare funds and the like, not other types of collective bargaining agreement provisions. The lesson of *Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1981), applies here as well: it is "virtually inconceivable that Congress would have prohibited [a] long-standing [labor management] practice . . . without any discussion in the legislative history of the Act."

Second, the legislative materials with respect to the amendments to the NLRA made at the same time and in the same piece of legislation as § 302 show that: the 1947 Congress was well-aware that collective bargaining agreements generally provided that part-time and full-time employee-union representatives were being paid lost time wages while performing their union duties; Congress was invited to frame specific, limiting regulations "on that whole problem"; and Congress declined that invitation in favor of legislation reflecting congressional *approval* of such payments and congressional *support* for assuring that

such practices, and denounced the Board for allowing only national unions to "enjoy these and other advantages." *Id.*

unaffiliated unions enjoy the same privileges as national unions in this regard.

Caterpillar is thus reduced to arguing that Congress, at one and the same time, recognized the legitimacy of no-docking agreements yet moved to make payments pursuant thereto a felony. And, Caterpillar must further contend that even though Congress exempted preexisting agreements providing for union-controlled welfare funds from the reach of § 302, Congress, *sub silentio*, concluded that collectively-bargained wage-continuation provisions were so much more pernicious that not even preexisting agreements deserved any shelter. Those arguments collapse of their own weight.

6. The interpretation of § 302 that we urge is supported not only by its text and legislative history, but by fifty years of subsequent developments as well.

(a) Perhaps most probative of all are the contemporaneous understandings of § 302, and none more so than that set forth by the National Association of Manufacturers in an issue of the *NAM Law Digest* on the LMRA which was published in June, 1947, immediately after the law's enactment. Noting that "it is sometimes a practice for employers to pay union stewards or other union officials for time spent during a part or the whole of a working day on union business, handling grievances, negotiating or other matters," the NAM posed the question of whether "such activity is a legitimate 'service' . . . and thus within the exception under subsection (c)(1)." National Association of Manufacturers, *NAM Law Digest* at 73 (June, 1947). The NAM answered that question as follows: "*The legislative history of the Section seems to support the view that it is since there is no indication of any intent to disturb existing employer-employee practices not extortionate in nature.*" *Id.* (emphasis added).

The Department of Labor came to a similar conclusion shortly thereafter. In 1948, the Wage and Hour Administrator of the Department of Labor concluded that the enactment of § 302 did *not* affect his prior ruling, see

pp. 14-15 *supra*, that the Fair Labor Standards Act *requires* pay for employee-union representatives for time spent during regular working hours in adjusting grievances. *Wage and Hour Manual, supra*, 45:291 (1949 ed.).

The parties to the collective bargaining process—employers and unions alike—manifested by their actions a similar viewpoint. If, as Caterpillar contends, § 302 was intended to affect a sea change in the practice of paying employee-representatives for time spent on union business—and to create criminal liability for such payments—employers and unions missed the point completely since they continued to negotiate such agreements under the newly-enacted law.³⁵

(b) Beginning in the 1950's, the National Labor Relations Board weighed in, albeit in the context of cases brought under §§ 8(a)(2) and (a)(5) of the NLRA.

Section 8(a)(2) makes it an unfair labor practice for an employer to "contribute financial or other support" to a labor organization. A "quite narrow" proviso, Pet. Br. at 40, allows an employee to confer with his employer without loss of pay. Because of the narrowness of the proviso, the NLRB was called upon to decide whether payments to employee-union representatives, which could not claim *per se* immunity under the proviso because not limited to time spent in meetings with management, were unlawful as "contribut[ions of] financial support"—under § 8(a)(2). The NLRB repeatedly answered that question "no."

For example, in *Hannaford Bros. Co.*, 119 NLRB 1100, 1101 (1957), the Board held that the employer's practice of paying committeemen for time spent on com-

³⁵ See, e.g., Bureau of Labor Statistics, *Labor-Management Contract Provisions 1950-51* 8-9 (Bull. No. 1091, 1951); Bureau of Labor Statistics, *Collective Bargaining Clauses: Company Pay for Time Spent on Union Business* (Bull. No. 1266, 1959); Bureau of Labor Statistics, *Major Collective Bargaining Agreements* 26-30 (Bull. No. 1425-1, 1964).

mittee business is "not sufficient to constitute financial or other support proscribed by Sections 8(a)(2) and (1)." In *Sunnen Products*, 189 NLRB 826 (1971), the Board likewise upheld the practice of permitting an independent union to hold its monthly board meetings during working hours without loss of pay; the Board described this as the kind of practice that "serve[s] to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case," *id.* at 828. And, in *Axelson, Inc.*, 234 NLRB 414 (1978), *enf'd*, 599 F.2d 91 (5th Cir. 1979), the Board held—with the approval of the Fifth Circuit—that the employer in that case had committed an unfair labor practice by unilaterally abandoning its past practice of paying union representatives for time spent in negotiations; in the Board's view "the payment of wages to employees negotiating a collective bargaining agreement . . . is . . . a mandatory subject of bargaining." *Id.* at 415.

The Board gave the matter its fullest treatment in *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), *enf'd*, 798 F.2d 849 (5th Cir. 1986). There the Board upheld an agreement which permitted union officers four hours per day of paid union leave, explaining:

The use of company time and property does not per se establish unlawful employer support and assistance. "Where a union lawfully has been established as the employees' bargaining representative, and has been accorded lawful recognition by an employer who, following recognition, deals with that representative at arm's length," the Board has regarded the use of company time and property, in the absence of deeper employer involvement or intrusion in union affairs, to be merely "friendly cooperation growing out of an amicable labor management relationship." . . . "[T]o require employers to follow a practice of docking employees for brief periods of time spent in conference with a union representative whose duty it is to service employees in an organized plant would often create an abrasive and wholly unnecessary interfer-

ence with a healthy contractual relationship. [*Id.* at 980; citations omitted]³⁶

The Board in *BASF Wyandotte* went on to consider the employer's claim that it was privileged to refuse to make the payments at issue because such payments would violate § 302. The Board rejected that argument, concluding that the payments "are encompassed within the exception set forth in Section 302(c)(1) for payments made as compensation for, or by reason of, the services of union officers as employees of the employer." 274 NLRB at 979. The Board added:

We note that a contrary holding . . . would be inimical to the statutory goal of encouraging cooperative labor relations. Moreover, such privileges in themselves hardly amount to bribery of employee representatives or extortion of employers, the evils at which Section 302 is aimed. [*Id.*]³⁷

Finally, it bears noting that in a series of decisions spanning more than thirty years, the lower courts have repeatedly upheld agreements like the one at issue here.³⁸

³⁶ Against this background, Caterpillar could not be more wrong in relying on § 8(a)(2) to support its attempt to invalidate all collective bargaining agreements providing for lost time pay to employee-union representatives save those limited to pay for time spent in meetings with management.

³⁷ See also *National Fuel Gas Distribution Corp.*, 308 NLRB 841 (1992). There the Board found no § 302 violation in an agreement pursuant to which employees on full-time leave to hold union staff positions continued to accrue pension credits and which required the employer to make matching contributions into the pension plan on behalf of these employees. The Board held that these "constitute compensation 'by reason of' services performed for the [employer]." *Id.* at 844.

³⁸ See *BASF Wyandotte Corp. v. Chemical Workers*, 791 F.2d 1046 (2d Cir. 1986); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986); *Herrera v. UAW*, 73 F.3d 1056 (10th Cir. 1996); *CWA v. Bell Atlantic*, 670 F. Supp. 416 (D.D.C. 1987); *UAW v. CTS Corp.*, 783 F. Supp. 390 (N.D. Ind. 1992); *IBEW v. National Fuel Gas*, 16 Employee Benefits Cases (BNA) 2018 (W.D. N.Y. 1993); *Employees Independent Union v. Wyman Gordon*, 314

(c) Against this background, the words of *United States v. Emmons*, 410 U.S. 396, 410 (1973), are especially apt: "It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction . . . its action would have so long passed unobserved."

D. Caterpillar's Arguments of Policy

Faced with the statutory language of subsection (c)(1) which by its terms makes ample room for paid leave for employee-union representatives, and lacking any evidence in the legislative history that Congress intended to condemn this well-established practice, Caterpillar is relegated to arguments of policy. Those arguments are unavailing.

1. At the threshold, it is important to note that Caterpillar does not even attempt to claim that collective bargaining agreements providing for paid leave to employees holding union office constitute a form of "corruption of collective bargaining through bribery . . . extortion or . . . abuse of . . . power"—the evils against which § 302 has heretofore been understood to be aimed. *Arroyo v. United States*, 359 U.S. at 425-26.

Instead, donning the mantel of protector of employee rights, Caterpillar asserts that "[i]n addition to preventing bribery, extortion, and secret deals," § 302 should be understood to "erect a firm financial barrier" against payments from employers to employees elected to union office" in order "to preserve the independence of labor from management, a fundamental tenet of American labor policy," and "to ensure that control of the purse strings of labor organizations remain firmly in the hands of the union members themselves," Pet. Br. at 16-17.

There is no small irony in the fact that Caterpillar's professed concern over the "independence of labor" comes

F. Supp. 458 (N.D. Ill. 1970); *United States v. Motzell*, 199 F. Supp. 192 (D.N.J. 1961). See also *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989) (dictum); *United States v. Phillips*, 19 F.3d 1565 (11th Cir.), cert. denied, 514 U.S. 1003 (1994) (dictum).

in the midst of a now six-year long battle between the UAW and Caterpillar in which the UAW has pursued every available avenue to pressure Caterpillar into abiding by the labor standards negotiated for employees in the agricultural implement industry. That struggle has entailed two national strikes, one lasting more than five months and another lasting seventeen months, as well as hundreds of smaller skirmishes. Caterpillar's stated desire to vindicate the independence of the UAW and other unions rings hollow, indeed.³⁹

2. There is no doubt that, as Caterpillar puts it, the "dividing line between management and labor [is] fundamental to the industrial philosophy of the labor laws in this country," *id.* at 17, quoting *NLRB v. Hendricks County*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part). And, the respondent Union would be the last to denigrate the importance of trade unions which are independent of management and controlled solely by their members. But the fact of the matter is that sixty years of experience belies Caterpillar's absolutist conception of the requisites for "independence of labor from management," and proves that unions which are formed by employees, governed by employees, and whose leaders are elected by employees do not surrender their independence by negotiating in collective bargaining for paid leave for employee-union representatives.

As we have seen, from the very start of industrial unionism men like Walter Reuther—who put their lives on the line to organize workers in the automobile, steel and other mass-production industries of the day—negotiated arrangements to allow workers elected to grievance-handling positions to devote full time to those responsibilities without loss of pay. Surely no one can seriously contend that Reuther and his compatriots were acting for

³⁹ Cf. *Auciello Iron Works Inc. v. NLRB*, — U.S. —, 116 S.Ct. 1754, 1760 (1996) ("an employer's benevolence as its workers' champion against their certified union" should be viewed with "suspicion").

and on behalf of management rather than for and on behalf of the workers they represented.

Nor can it sensibly be maintained that each and every one of the major industrial unions—including not only the UAW but also, e.g., the Communications Workers, Machinists, Rubber Workers, Utility Workers and Steelworkers—are not now, and have never been, labor unions independent from management.⁴⁰ Certainly, Caterpillar points to no empirical evidence to support its hypothesis that unions which negotiate no-docking arrangements—including every major industrial union—are not independent unions in fact and in deed.

3. In the face of this rich historical experience, Caterpillar stands on pure theory. The (unstated) major premise underlying Caterpillar's theoretical argument is that the cost of the time spent by employee-union representatives in adjusting grievances is, in the very nature of things, an expense of the union, and that by allowing these representatives to work on grievances during their working hours without loss of pay, an employer is necessarily subsidizing the union.⁴¹

⁴⁰ In the UAW, CWA, Machinists, Rubber Workers and Utility Workers, at least 80% of their collective bargaining agreements provide for employer pay for employee-union representatives. See Bureau of Labor Statistics, *supra* n.14, at 6. For the Steelworkers, the comparable figure is 48%. *Id.*

⁴¹ The minor premise of Caterpillar's argument is that an employer contribution towards an expense that is inherently a "union" expense will corrode the union's independence. But it is far from clear, even in theory, that unions which are established and governed by workers—and whose leaders are elected only by the member-workers and accountable only to them—will forfeit their independence if they are less than 100% self-sufficient.

Indeed, on Caterpillar's theory, not only are there no truly independent industrial unions, there also are no independent public defenders, since public defenders are paid by the state to oppose the state in adversarial proceedings. Nor, on Caterpillar's theory, can trustees who are paid by a union or employer be expected to discharge their fiduciary duty without regard to the interests of the party paying them. *But cf. NLRB v. Amaz Coal Co.*, 453 U.S. 322, 329 (1981) (trustees "bear[] an unwavering duty of complete

As we have seen, however, the premise of those who created the system of grievance processing and industrial workplace representation—and whose commitment to trade union independence is beyond question—was quite different. In their view, the problem-solving, peace-keeping aspect of that system is good for employers and unions alike, and the work of administering that system is on a par with the work production employees perform for the enterprise.

Thus, the pioneers of industrial unionism—and those who have followed in their footsteps—negotiated for arrangements to allow the work of day-to-day grievance adjustment to be done by production workers chosen by their fellows and to assure that these workers could perform that work during their normal working hours without loss of pay. The agreements thus negotiated served to both legitimize the role of the employee-union representatives and also made it possible to institutionalize a system of worker-run, in-plant representation—a system which assures that employee-stewards will be accessible to every worker in the workers' individual departments while at the same time assuring a measure of plant-wide coordination through the grievance committee and the employee-grievance chair. And, this was done without compromising the independence of these industrial unions because the cost of the lost time was seen as a proper *enterprise* cost and not one that, by reason of the theory of independent unionism, must be borne by the union and its worker-members.⁴²

loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties" and are not "representatives" of the party appointing or paying them).

⁴² Caterpillar thus could not be more wrong in suggesting that the "distinction" between a "full-time union representative who was [an] employee" and union officials "who were never employees of the employer" is an "irrational distinction." Pet. Br. at 25. The policies underlying § 302 could well be undermined if unions could demand that employers add to the payroll, and pay, those who have never done any work for the employer, *cf. Reinforcing Iron Workers*

4. The practical consequences of embracing Caterpillar's proposed reading of § 302(c)(1) would be profound. Overnight, vast numbers of collective bargaining agreements would be invalidated and the overwhelming majority of industrial unions, and the employers with which those unions deal, would be turned into criminals—indeed, felons.

Perhaps in recognition of the labor-management cataclysm its argument entails, in the final moment Caterpillar loses the courage of its convictions and proposes “some indulgence when applying section 302 to active employees who perform representative services on the shop floor.” Pet. Br. at 45. But Caterpillar's reading of § 302(c)(1) allows for no such “indulgence”: if, as Caterpillar maintains, § 302(c)(1) permits only payments “in spite of” an employee's status as a union representative—and if, as Caterpillar also maintains, the only exception is for payments authorized by the proviso to § 8(a)(2)—then lost time payments for time spent on representational tasks are illegal regardless of whether the recipient also spends part of the day on production work.⁴³

Local Union 426 v. Bechtel Power Corp., 634 F.2d 258 (6th Cir. 1981); those same dangers simply are not posed—and, as explained in text, important interests are furthered—by continuing wage payments to employees elected to part-time or full-time union office.

At the same time, the practice of paying employee-representatives their regular wages undoubtedly contributed, and continues to contribute, to the willingness of employees to seek and hold such positions; it is questionable how many workers would be willing to do so if accepting a union position meant giving up the employer's health insurance, pension plan and the like. (Indeed, on Caterpillar's reading of § 302, it is not even clear that an employer can grant an employee elected to union office an unpaid leave with the right to return, since that right itself is arguably a “thing of value” under § 302(a).)

⁴³ To support the distinction it proposes between employee-union representatives who take time off as needed to adjust grievances and those who, *de jure*, devote their full time to doing so, Caterpillar states that “[t]he full time union official, whether or not he was an employee of the employer, is not an employee.” Pet. Br. at 47 (emphasis in the original). Even if it were true that taking a

Moreover, the distinction Caterpillar proposes—allowing pay for employee-union representatives who take time off “as needed for fellow employees” but not to those who devote full-time to assisting fellow employees—would lead to mind-bending problems of line-drawing. Suppose an employee-representative finds it necessary to devote one full day to assisting fellow employees; may such an employee be paid her regular wages? What if the representative finds it necessary to devote one full week, or month to representational functions; at what point does the individual cross the line Caterpillar would draw? Conversely, can an employee-union representative avoid being considered “full time” by working one hour per day in the plant? One hour per week?

These are not just theoretical concerns. The fact of the matter is that in large plants with a large volume of grievances, employee-union representatives at the higher stages of the grievance process can and do find it necessary to devote most if not all of their working hours to their grievance processing responsibilities. That was the case at Caterpillar. Indeed, that was at least part of the reason the parties agreed to create a limited number of *de jure* full-time grievance handling positions. And, the line Caterpillar proposes is not only unprincipled but impractical as well.

5. That brings us to the final failing of Caterpillar's argument. One of the geniuses of the collective bargaining system is precisely that it enables the parties to arrive at practical solutions to practical problems. An employer

leave of absence terminates the employment relationship—and it is not, *see pp. 18-19 supra*—§ 302(c)(1), in terms, permits payment to present or former employees, rendering the present status of the recipient besides the point.

Caterpillar also argues that the Company “does not have the power or right to control or to direct how the full-time union officials perform their duties.” Pet. Br. at 49. But Caterpillar is equally powerless to “control or to direct” how *part-time* union officials perform their *representational* duties. This, too, then, cannot explain the distinction Caterpillar seeks to draw.

and a union might well conclude, for example, that it is better for all concerned to have one grievance chairman devoting full time to grievance processing than, e.g., to have four committeemen each devoting two hours a day to their representational responsibilities.

After all, allowing one representative full-time for such work is likely to be far less disruptive of production than authorizing four employees to spend part of each day on union work. And, one full-time grievance representative may well become more adept at resolving grievances effectively and efficiently than four individuals who spend only two hours per day adjusting grievances. Yet, on Caterpillar's theory, § 302 imposes a straitjacket which somehow allows for the part-time arrangement yet prohibits—indeed criminalizes—the full-time arrangement.

Congress is, of course, free to adopt such a regime if it so desires. But if Congress were to focus on this area, Congress could—and undoubtedly would—make a set of nuanced, policy distinctions that are peculiarly the province of the legislative branch. Indeed, the 1947 Congress, focused as it was on welfare funds, *see* pp. 30-31 *supra*, did just that in LMRA § 302(c)(5)—the subsection which deals specifically with such funds. Rather than banning collective bargaining over the creation of such funds, Congress instead enacted rules with respect to, e.g., the permissible purposes of welfare funds and such funds' permissible form and structure. Congress in striking the regulatory balance even went so far as to grandfather union-controlled welfare funds in existence as of 1947 and to apply § 302(c)(5) only prospectively.

Congress followed a similar, and even more directly relevant, tack in 1978 in enacting the Civil Service Reform Act ("CSRA"), 5 U.S.C. §§ 1201 *et seq.* The 1978 Congress deemed it appropriate, in extending collective bargaining rights to federal employees, to treat in detail with the issue of paid time (denominated "official time") for federal employee-union representatives. Accordingly, CSRA § 7131 distinguishes between—and adopts different

rules governing—four discrete categories of paid leave: (i) leave used "in the negotiation of a collective bargaining agreement" (which the CSRA requires employees be granted); (ii) leave "relating to the internal business of a labor organization" (which the CSRA forbids); (iii) leave to "participat[e] . . . in any phase of proceedings before the [Federal Labor Relations] Authority (which the FLRAA may require); and (iv) all other types of leave. As to the last category, the judgment Congress made was to permit the parties, by agreement, to grant "any employee representing an exclusive representative . . . official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary and in the public interest."

Of course, because § 302 was enacted thirty years before the CSRA, the latter cannot control the interpretation of the former. But the CSRA, like any subsequently-enacted law, can at least "throw a cross light" on the earlier enactment," *Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 481 (1961) (*quoting* L. Hand, J.). And given that "the basic assumption underlying collective bargaining in both the public and the private sector [is] that the parties 'proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest,'" *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107-08 (1983), *quoting*, *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960), the fact that the 1978 Congress that enacted the CSRA saw no conflict between the CSRA labor relations system and the provision of "official leave" for employee-union representatives certainly proves that Caterpillar's reading of § 302 is not necessary "to ensure the integrity" of the collective bargaining system." Pet. Br. at 16.

5. The short of the matter is this. If Congress were to conclude that, despite their long history and wide prevalence, collective bargaining agreements allowing paid leave for employee-union representatives threaten the national labor policy, Congress plainly could regulate such

agreements, either by prohibiting such agreements *in toto* or by drawing whatever lines Congress deemed appropriate. But Congress simply has not done so. That was not what § 302 was about. And, the point of § 302(c)(1) is to exclude from the ambit of § 302 the class of payments made, in the context of an employment relationship, to present or former employees who have been elected or appointed to a union position.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

APPENDIX

§ 301. Restrictions on financial transactions

- (a) Payment or lending, etc, of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employee in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United

States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished; (A) to initiate any

proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of

not more than \$10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

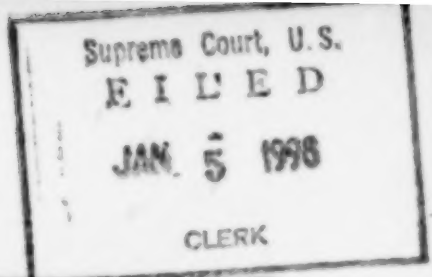
(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

(13)
No. 96-1925



In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated
LOCAL UNION 786,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	<i>Page</i>
ARGUMENT	1
A. The "Practice" of Employers Paying the Wages of Full-Time Union Officials Is Neither Com- mon Nor Longstanding	1
B. The "Practice" at Issue Is <i>Not</i> Simply "No Docking" for <i>Grievance Handling</i> . The Union Officials on Long-Term Leave of Absence Here Are Regularly Paid Full Wages for Virtually All Hours Except "Activity Not Directly Related to the Functions of Their Office"	4
C. The Departments of Justice and Labor Contin- ue to Operate Under the Erroneous Belief that the Non-Textual Limitations They Would En- graft on the Statute Have Not <i>Already</i> Been Exceeded in Practice	6
D. The AAMA Demonstrates How Far Afield the UAW's Open-Ended Interpretation of § 302(c)(1) Allows Contracting Parties to Wander	10
E. The Union's Analysis of Legislative History Rests Upon an Erroneous Premise as Well	13
F. By One Artifice or Another, the Union's and <i>Amici's</i> Construction of Section 302(c)(1) Con- tinues to Tacitly Read the Nexus Requirement of the Provision Out of the Statute	15
G. The Full-Time Committeemen are Former Em- ployees of Caterpillar and Current Employees of the Union	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
<i>Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971)	18
<i>Axelson Mfg. Co.</i> , 88 NLRB 761 (1950)	13
<i>BASF Wyandotte Corp.</i> , 274 NLRB 978 (1985)	15
<i>Carpenter Steel Co.</i> , 76 NLRB 670 (1948)	13
<i>Colorado Fuel & Iron Corp.</i> , 22 NLRB 184 (1940), <i>enfd</i> , 121 F.2d 165 (CA10 1941)	13
<i>Communications Workers of Am. v. Bell Atlantic Network Services, Inc.</i> , 670 F.Supp. 416 (D.D.C. 1987)	1
<i>International Harvester Co.</i> , 2 NLRB 310 (1936)	13
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)	9
<i>Remington Arms Co.</i> , 62 NLRB 611 (1945)	13
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (CA7 1989)	1
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council</i> , 785 F.2d 101 (CA3 1986)	1, 18
<i>United States v. Phillips</i> , 19 F.3d 1565 (CA11 1994)	1
<i>Wilson & Co.</i> , 31 NLRB 440 (1941), <i>enfd</i> , 126 F.2d 114 (CA7 1942) <i>cert. denied</i> , 316 U.S. 699 (1942)	13
<i>Wyman-Gordon Co.</i> , 62 NLRB 561 (1945), <i>enfd</i> , 153 F.2d 480 (CA7 1946)	13, 14

STATUTES:

29 U.S.C. § 158(a)(2)	4, 13, 14
29 U.S.C. § 186	4, 14, 18
29 U.S.C. § 186(a)	12
29 U.S.C. § 186(c)(1)	<i>passim</i>
29 U.S.C. § 186(c)(9)	11, 12
Pub. L. 95-524, 92 Stat. 1990	11

MISCELLANEOUS:

NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1985)	14
H.R. REP. NO. 245, 80th Cong. (1947)	14
H.R. REP. NO. 510, 80th Cong. (1947).	14
S. REP. NO. 105, 80th Cong. (1947)	14
H.R. 3020, 80th Cong. (1947)	14
Bureau of Labor Statistics, <i>Grievance Procedures Under Collective Bargaining</i> (1946)	3
Bureau of Labor Statistics, <i>Collective Bargaining Provisions: Grievance and Arbitration Provisions</i> (Bulletin No. 908-16) (1950)	2
Bureau of Labor Statistics, <i>Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business</i> (1980)	3
<i>Ford Motor Co.</i> , Opinion A-124 (1944), <i>reprinted in H. Shulman & N. Chamberlain, Cases on Labor Relations</i> (1949)	2

ARGUMENT

The arguments of the UAW and its *amici* are founded upon a series of erroneous premises:

A. The "Practice" of Employers Paying the Wages of Full-Time Union Officials Is Neither Common Nor Long-standing

The UAW and *amici* create the impression that payment by employers of full-time union officials to serve as full-time union officials is a "common," "longstanding," "pervasive" and "typical" practice. They do so by continuing to conflate the concept of, and the precedent for, "not docking" active employees who perform representational duties on an "as needed" basis with the payment of wages to full-time union officials at issue in this case.

What the various materials cited by the UAW do show is that while the War Labor Board may have allowed active employees time off to serve as grievance handlers as needed during the war effort and while the auto industry and the UAW apparently have silently pursued the practice of paying "full-time" grievance handlers, this latter practice has rarely been adopted elsewhere. The multi-union/industry AFL-CIO has identified no other industry to which the practice has spread (with the exception of the auto-patterned "ag-imp" industry). Existing case law involving the transit (*Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3 1986)), communications (*Communications Workers of Am. v. Bell Atlantic Network Services, Inc.*, 670 F.Supp. 416 (D.D.C. 1987)) and steel (*Toth v. USX Corp.*, 883 F.2d 1297 (CA7 1989) & *United States v. Phillips*, 19 F.3d 1565 (CA11 1994)) industries shows no practice of paying wages to full-time union representatives, but merely some attempts to provide continued participation in various jointly administered benefit plans.

The UAW suggests without record support, for both the auto industry and "manufacturing generally," that full-time pay provisions have been an integral part of successful grievance and arbitration procedures and have been widely adopted.¹ UAW Br. at 13. In reality, according to the 1950 Bureau of Labor Statistics (hereinafter "BLS") study cited by the UAW, such pay practices were *not* widespread at all:

A few agreements covering large plants provide for a designated number of representatives to devote full time to grievance work. Usually, however, *only time actually spent on grievance work is paid* by the employer. . . . Where the time allowance is on a daily basis, the representative is sometimes allowed to average the time over a week or longer period, since the time consumed by grievance work may vary greatly from day to day.

Bureau of Labor Statistics, *Collective Bargaining Provisions: Grievance and Arbitration Provisions* (Bulletin No. 908-16) at 59 (1950) (emphasis added).²

¹ The UAW also erroneously suggests that Dean Shulman's 1944 arbitration award supports its contention as to why such pay practices were adopted. See UAW Br. at 13. In fact, the quotation attributed to Dean Shulman represented no judgment on his part, nor did it even suggest that such practices were widespread or even preferable. Shulman merely noted that while "many unionists" believed that unions should compensate stewards or committeemen for time handling grievances, other "newer unions . . . especially the UAW (CIO)," had adopted a different approach based on the philosophy quoted by the UAW in its brief. *Ford Motor Co.*, Opinion A-124 (1944), reprinted in H. Shulman & N. Chamberlain, *Cases on Labor Relations* at 24 (1949).

² Similarly, the 1944-45 BLS study cited by the UAW regarding the prevalence of pay practices of "employee-union" representatives nowhere suggests that the individuals being described were full-time representatives. In fact, the accompanying discussion regarding requirements that "union representatives . . . report to their foreman before leaving work to handle grievances" and
(continued...)

Building on its conflation of concepts, the UAW points to a 1980 BLS study as proof that the "trend" started in 1941 became "integral" to "industrial workplaces." UAW Br. at 15. Once again, the UAW points to a study which, in fact, clearly distinguishes between compensation for part-time employee representatives and full-time union officials. Specifically, the 1980 BLS study makes clear that under the pay provisions discussed in the section of the study quoted by the UAW, the representatives in question were still "required to perform their regular jobs." BLS, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business* at 20 (1980). As for full-time union officials, the study reached a conclusion worlds away from that portrayed by the UAW:

Company pay for employees on leave to hold full-time union positions *was rare*. A small portion of the clauses referring to such leave (under 1 percent) required the company to retain the union official on the payroll, or at least to assume a part of the payroll costs. . . .

Id. at 29 (emphasis added).

Thus, in the end, the alleged "fifty years of experience that belies Caterpillar's hypothesis" is not supported by any of the studies cited by the UAW.

² (...continued)

other limitations on time spent investigating grievances demonstrates that the representatives discussed are more properly analogized to shop stewards. See BLS, *Grievance Procedures Under Collective Bargaining* at 184-85 (1946).

B. The "Practice" at Issue Is Not Simply "No Docking" for Grievance Handling. The Union Officials on Long-Term Leave of Absence Here Are Regularly Paid Full Wages for Virtually All Hours Except "Activity Not Directly Related to the Functions of Their Office"

The UAW and *amici* repeatedly attempt to create the impression that the full-time UAW officials here are mere grievance handlers and/or are only "not docked" their normal wages for such grievance handling work. Both the labor contract itself and the NLRB factual findings demonstrate otherwise.

1. *Labor Contract.* The "no docking" arrangement between Caterpillar and the UAW is contained in Article 2.2 of the Local Supplement. It provides:

In taking Step 1 [of the grievance procedure], Stewards may, without loss in pay for regularly scheduled hours, discuss a grievance with the aggrieved employee (provided the aggrieved employee first informs his immediate Supervisor of his desire for such discussion), with the employee's immediate Supervisor and, if the grievance is not satisfactorily settled in Step 1, with the Plant Grievance Committeeman who would handle the grievance in Step 2.

J.A. at 44. An equivalent "no loss in pay" allowance is granted to the active worker who also serves as a *Plant Grievance Committeeman in grievance discussions. Id.*

The foregoing is unmistakably a *bona fide* "no docking" arrangement for active workers when engaged in actual grievance handling, fully consistent with § 8(a)(2) proviso and § 302. *It is not at issue.*

In stark contrast, the Central Agreement separately provides for ongoing wages of the full-time officials. J.A. at 13-15. While Article 4.6 listed certain "privileges" granted the "Chairman" (and his alternate), which relate primarily to handling grievances, the provision went on to provide for a "leave of absence" during which:

The Chairman . . . shall conduct *his business* from the Local Union office. He . . . will be paid by the Company for his regular shift hours . . . provided, however, the Company shall not pay for time spent in (i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union Office or (iv) *any activity not directly related to the functions of his office.*

J.A. at 14 (emphasis added). The difference is manifest; stewards and plant grievance committeemen are only to suffer no loss in pay during grievance discussions. The Chairman, on leave of absence, is paid for all functions of his office, except certain limited exceptions.

2. *Record Findings.* The record bears out this distinction in practice. The York Chairman, for example, was regularly paid virtually full salary, receiving 35 to 46 hours of pay in 70 percent of the weeks reported (which period *included* the extraordinary 1991-92 labor negotiations with which he was occupied and for which he was not to be paid). J.A. at 73-81. During this time, only between 79 and 140 grievances per year even reached his level³ and he visited the plant only one day per week on average. Cir. App. at 188-89. As the NLRB administrative law judge noted, "chairmen spend substantial time away from their respective plants where what they do is unknown to [Caterpillar]."⁴ Pet. App. at 77a. Thus, the ALJ concluded:

While Charging Party seems to maintain that never do the chairman and committeemen do anything during

³ 1990: 90 grievances reached Third Step; 1991: 79 grievances; 1992: 140 grievances. Cir. App. at 435.

⁴ At the NLRB hearing, Orndorff admitted that Caterpillar "wouldn't know whether you were working on grievances or working on Union business or doing crossword puzzles or what." Pet. App. at 58a-59a.

the work week than handle grievance and engage in contract administration, such is difficult to believe. These are elected officers of their respective local unions. They are among the leadership. *It is simply not credible that during their time at the local union hall, chairmen and committeemen never discuss matters of general union interest, including tactics and strategies involved in this labor dispute.*

Id. at 77a-78a (emphasis added).⁵

Thus, the ALJ likened the full-time committeemen to assistant union business agents in the construction or retail food industry. *Id.* at 76a. In short, the union officials at issue are simply *not* "in-shop grievance handlers."

C. The Departments of Justice and Labor Continue to Operate Under the Erroneous Belief that the Non-Textual Limitations They Would Engraft on the Statute Have Not Already Been Exceeded in Practice

The Departments of Justice and Labor continue to operate not only under the misconception that the UAW

⁵ The ALJ's conclusion was well justified. As Orndorff testified, the Grievance Committee and the Bargaining Committee of Local 786 are one in the same. Cir. App. at 601. As part of his duties as Chairman, he conducted training sessions for stewards and committeemen, *id.* at 609, and conducted Grievance Committee meetings. *Id.* at 631. Although the committeemen were not paid by Caterpillar for time spent in such meetings, Orndorff apparently was. *Id.* at 631, 641. In fact, Caterpillar paid for Orndorff's attendance at any meeting held at the Union hall. *Id.* at 641. Orndorff was apparently paid for the time he spent *preparing* for negotiations. *Id.* at 640-641. Caterpillar paid for his vacation and his other absences. *Id.* at 620, 622. When Orndorff and his assistant were absent from the hall, Caterpillar paid the wages of a committeeman who served as the full-time officer in their stead. *Id.* at 618; J.A. at 15. The UAW's claim that it was the Company's idea to have the Chairman based at the union hall is not true. *Id.* at 477.

officials at issue here are merely paid "grievance handlers," but also that the government can successfully engraft non-textual limits onto the statute as they deem fit.⁶ As Caterpillar has already observed, none of these limits can be found anywhere in the statutory language or in its history. And, if the collective bargaining agreement *defines* what is payment "by reason of service as an employee," then positing limits is an exercise in wishful thinking.

The *reality* is that these and the other non-textual limits the government proposed before the Third Circuit (to no avail) are *already* being transgressed in *this* case and/or, apparently, in the auto industry:

- (1) Full-time committeemen are not paid *just* to handle grievances. *See* Part B, *supra*.
- (2) Full-time committeemen do participate in the negotiation of their own wages.⁷

⁶ Thus, the government apparently limits its approval of employer pay to union officials:

- (1) for time spent handling grievance matters for other employers (DOJ/DOL Br. at 2);
- (2) where the individual "is considered on a leave of absence by virtue of having been elected . . ." (*Id.* at 2);
- (3) where payments are proportionate to employee's prior service (*Id.* at 13);
- (4) where the representative handles grievance matters on a full time basis (*Id.*);
- (5) by a person "not engaged principally" in union business "other than contract administration" (*Id.*); or
- (6) where payments are not a "corrupt effort" to conceal "improper inducements." (*Id.*).

⁷ Under Local 786 bylaws, Orndorff is a member of the bargaining committee and also served on the Central Bargaining Committee. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 9; Cir. App. at 183-84, 629. Before

(continued...)

- (3) While Caterpillar's full-time committeemen are elected, there is no such requirement in law or the UAW's constitution that all representatives be elected. For example, certain auto industry union representatives are appointed (*see infra* at pp. 9-10 & n. 12).
- (4) Full-time committeemen can serve, and have served, for years and are paid regardless of how brief their prior employment may have lasted.⁸
- (5) Full-time committeemen are not paid on the same basis as unit personnel, "proportionate" with service or "commensurate" with their regular wage. As of the Caterpillar's termination of this practice, UAW negotiators were already earning six additional hours of pay virtually each week and were demanding that various officials' compensation be increased further beyond that which they had earned as workers. The Union sought 54 hours of pay per week regardless of whether overtime was actually worked; a benefit, as the NLRB ALJ noted, not available to workers and paid regardless of whether workers were being awarded any overtime. Cir. App. at 84a. Moreover, these hours were to be paid at top rates and with premiums regardless of whether officials had attained

⁷ (...continued)

the Third Circuit (*see* DOJ/DOL 3d Cir. Am. Br. at 28) the DOJ/DOL identified officials' participation in negotiation of their own wages and benefits as a reason for "close scrutiny." Before this Court, having learned the UAW fails the test, they have apparently dropped this caveat *without* explanation.

⁸ Many committeemen have been on paid leave longer than they had been employed. Cir. App. at 168. Below, the government also called for "close scrutiny" where payments are made to an individual "who has not worked for the company for an extended period" and "is unlikely to return to such work." DOJ/DOL 3rd Cir. Am. Br. at 28. Here again, the government seems to have dropped its concern expressed below.

such levels during their former work lives. Cir. App. at 167-68.⁹

- (6) The pay provisions for full-time committeemen are *not* "substantially similar," (DOJ Br. at 11) to no-docking provisions of the collective bargaining agreements. *Compare* Article 4.6 of Central Agreement with Article 2.2 of Local Supplement. J.A. at 14, 44.

As for the attribution of significance to the fact that a former employee-union agent from the bargaining unit (DOJ/DOL Br. at 4), was "experience[d]" and "aware of conditions in the workplace," nowhere does the government offer an explanation as to how these facts, or the absence thereof, could serve as a legitimate, statutory basis for assessing whether payment is lawful or unlawful. If such "experience" validates payments to "grievance handlers," then it is just as valuable to the employer to deal with "knowledgeable" international representatives, business agents and negotiators.

In short, *few* of the facts and circumstances in which the government purports to take such solace are true and *none* find any sustainable basis in the statute as criteria for assessing lawfulness.¹⁰

⁹ The government continues to conveniently ignore the findings of its own administrative law judge who specifically found the special assumed "overtime" arrangement to be a discriminatory preference not available to rank and file employees. Pet. App. at 82a-85a.

¹⁰ The government's new position that it does not seek remand because Caterpillar's failure to seek remand is "indicative that, on remand, Caterpillar would not adduce any additional evidence to suggest that the payments were illegal," DOL/DOJ Br. at 18, n. 10, is in error. Caterpillar obviously does not feel remand is necessary. If, however, this Court attributes significance to facts and circumstances beyond the material undisputed facts, then remand is called for. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982). Of particular importance, if the government's non-

(continued...)

D. The AAMA Demonstrates How Far Afield the UAW's Open-Ended Interpretation of § 302(c)(1) Allows Contracting Parties to Wander

The DOJ/DOL might do well to read the AAMA's brief if the government wishes to be disabused of its belief that § 302(c)(1), as so construed, can be, or is being, limited to "elected grievance handlers." Originally, in the auto industry, committeepersons and chairpersons apparently were only paid to "investigate" and "handle grievances" and other "in plant activities pertaining to the administration of the National Agreement . . .", *See, e.g.*, Cir. App. 334, 365. Now, the Court is informed by the AAMA that it and the UAW have interpreted § 302(c)(1) to allow the auto companies to pay union representatives not just to administer the grievance procedure but to meet and confer with the employer (dare we say, "negotiate") regarding such issues as "health and safety," "fringe benefits," and "quality," "among others."¹¹ Apparently, they have concluded that they can pay union officials for such activities pursuant to § 302(c)(1), whether they are "elected" (as the government

¹⁰ (...continued)

textual tests are deemed significant, Caterpillar is prepared to adduce additional proof as to the extent full-time committeemen were engaged in the negotiations of their own wages, paid regularly without regard to whether they were engaged in grievance handling and that Caterpillar had no way of knowing, let alone controlling, what, if anything, these officials were doing for their pay. Pet. App. at 58a-59a, 77a-79a.

¹¹ The phrase "among others" presumably can include a quantity of production. Consider, therefore, the following scenario: Union officials are *paid* by the employer, after having been *trained* by the employer (*see* AAMA Br. at 8), to convene a committee to discuss whether and ways in which production lines can be speeded up. Apparently, the union and the industry see no difficulty with such an arrangement.

presumes) or *appointed*,¹² by virtue of the Labor Management Cooperation Act of 1978, Pub. L. 95-524, 92 Stat. 1990 (hereinafter "LMCA") and its recognition in §302(c)(9) of the LMRA. *See* AAMA Br. at 2.

The LMCA, however, purports to encourage *worker-management* cooperation and a democratization of the workplace through *worker* involvement in the decision making affecting their daily work lives.¹³

It is not clear whether the "union representatives" referenced (AAMA Br. at 8) are elected or selected from the regular employee ranks just for a tour of duty on a particular project or study group, or if they are the type of plenary union official whose duties span the gamut of representational functions (or both). To the extent they are the latter, consider the result: Full-time union officials being "trained," *id.*, and then paid by the employer to supposedly represent the employees in *making* the decisions that will affect the workers' lives. Are opportunities for *worker* involvement being created or merely more occasions for employers to pay wages to union officials?

¹² *See, e.g.*, Cir. App. at 311-316.

¹³ Thus, §6(b) of that Act states that its purpose is:

- (2) to provide *workers* and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;
- (3) to assist *workers* and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process; and

* * *

- (5) to expand and improve working relationships between *workers* and managers. . . .

Pub. L. 95-524, 92 Stat. 1990 (emphasis added).

Worse still, consider the perversion of § 302(c)(9). That section was instituted to allow employers to provide *funding*, "money or other things of value . . . to a plant, area or industry wide labor management committee . . ."—not provide salaries to union officials.

If, of course, the UAW's interpretation of § 302(c)(1) is correct, then this further extension of wages to full-time union officials well beyond "grievance handling" is quite permissible. Indeed, thus construed, § 302(a) is rendered nugatory in the face of any "§ 302(c)(1) agreement" to pay any remuneration to any union officials who were previously in the employer's employ. In fact, the UAW makes no bones about it: "[T]he breadth of [§ 302(c)(1)] evinces an intent to cover [i.e., exempt], *without limitation*, the *universe* of bona fide remunerative payments made by an employer to its employees . . ." UAW Br. at 25 (emphasis added and in original). "*All bona fide remunerative payments* to employee-union representatives fall within this *broad exception*." UAW Br. at 8 (emphasis added).

The question remains: Did Congress *really* intend to allow employers to *pay* full-time union officials to represent their members with regard to matters of worker concern *whether* at the traditional bargaining table, *or* within these so-called "joint committee" frameworks or in the give and take of grievance meetings? It is so easy to be lulled into a belief that each incremental step must be permissible because it represents only a minor, almost imperceptible, progression. Yet one day the parties awake to find that the *ad hoc* "grievance handler" is a thing of the past. Instead, employer-"trained" and employer-paid full-time union officials predominate and these same union officials, who are not even based in the plant, are demanding 54 hours of pay each week at top rates because "its time they got a raise," Cir. App. at 167-68, and fully believing that there is absolutely nothing "wrong with this picture."

E. The Union's Analysis of Legislative History Rests Upon an Erroneous Premise as Well

The Union's analysis of legislative history rests on a faulty assumption—that employer payments to union representatives were perfectly legal before 1947. Upon this assumption, the Union would lead the Court on a search for evidence in 1947 that Congress intended to prohibit payments lawful before 1947. The evidence is in the legislative history of the 1935 Wagner Act, in which such payments were first banned.

Between 1935 and 1947, the NLRB had repeatedly concluded that employer payments to union representatives were permissible only if the payments satisfied the specific requirements of the lost-time proviso to § 8(2).¹⁴ Although most of the unions at issue were also employer-dominated, the payments were unlawful even without such domination. Thus, the House correctly recognized in 1947 that employer

¹⁴ See, e.g., *Wyman-Gordon Co.*, 62 NLRB 561, 567 (1945), *enf'd*, 153 F.2d 480 (CA7 1946); *Wilson & Co.*, 31 NLRB 440, 455 (1941), *enf'd*, 126 F.2d 1114 (CA7 1942), *cert. denied*, 316 U.S. 699 (1942); *Colorado Fuel & Iron Corp.*, 22 NLRB 184, 220-21 (1940), *enf'd*, 121 F.2d 165 (CA10 1941); *International Harvester Co.*, 2 NLRB 310, 353-55 (1936); see also *Axelson Mfg. Co.*, 88 NLRB 761, 776-77 (1950); *Carpenter Steel Co.*, 76 NLRB 670, 688 (1948); cf. *Remington Arms Co.*, 62 NLRB 611, 614 (1945) (no violation where payments conformed to proviso). In *Wyman-Gordon Co. v. NLRB*, *supra*, the Seventh Circuit rejected NLRB findings of domination but affirmed the conclusion that the employer had violated § 8(2), largely because payments to union representatives did not conform to the proviso. *Id.* at 482.

The NLRB expressly rejected contrary decisions of the War Labor Board and the Wage and Hour Administrator, on which the Union relies. *Axelson*, 88 NLRB at 777; *Wyman-Gordon*, 62 NLRB at 567.

payments not covered by the proviso were unlawful,¹⁵ and the Senate insisted that § 8(2) remain unchanged because it *approved* of the existing ban, inserting only a nondiscrimination provision to ensure that ban was applied to affiliated unions. See S. REP. NO. 80-105, at 12 (1947), reprinted in 1 LEG. HIST. LMRA, *supra*, at 418.¹⁶

Because employer payments to union representatives were *already* prohibited, except as narrowly authorized in the lost-time proviso, they did not merit any special mention during the broader debate over § 302. The simple fact is Congress considered employer payments not covered by the proviso already unlawful in 1947 and in enacting § 302's broad ban, subsumed the preexisting ban and limited exception of § 8(2).¹⁷

¹⁵ H.R. REP. NO. 80-245, at 28-29 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 319-20 (1985) [hereinafter LEG. HIST. LMRA]. The House sought to amend § 8(2) so as to *legalize* such payments, but the effort failed. The House proposed to allow any employer payments not motivated by an intent to corrupt the recipient union official. H.R. 3020, sec. 101, § 8(a)(2) (1947), reprinted in 1 LEG. HIST. LMRA, *supra*, at 20-21. The Senate rejected the proposal, however, and added section 302, which also did not contain an intent element that would narrow the existing prohibition. Congress was also clearly aware of *Wyman-Gordon*. See H.R. REP. NO. 80-245, at 41, reprinted in 1 LEG. HIST. LMRA, *supra*, at 332.

¹⁶ Contrary to the Union's misleading suggestion (UAW Br. 35), the House Managers expressly acknowledged that the conference bill allowed employers to pay union representatives only for time spent conferring with management. H.R. REP. NO. 80-510, at 45, reprinted in 1 LEG. HIST. LMRA, *supra*, at 549.

¹⁷ The Union has emphasized NLRB decisions *subsequent* to 1947, in which the Board relaxed its strict enforcement of § 8(a)(2)'s ban on any financial support in response to a series of losses in the Courts of Appeals. Those decisions obviously do not shed any light on what Congress was thinking in 1947. Moreover, the cases cited, at best, refer to not requiring "a practice of (continued...)"

F. By One Artifice or Another, the Union's and Amici's Construction of Section 302(c)(1) Continues to Tacitly Read the Nexus Requirement of the Provision Out of the Statute

At page 20 of its brief, the UAW misquotes the statute. Undoubtedly an inadvertence, it is a revealing, almost Freudian, misstatement. The Union there states that "it is undisputed that the payments . . . are lawful if 'payable . . . by reason of', the Grievance Chairman's 'service as an employee or former employee' of Caterpillar." That is *not* what the statute says. It *does* allow payments [to a former employee] for "service as an employee." It *does not* allow payments for "service as a *former* employee." And there most assuredly is a difference—a difference which highlights the sophistry afoot here.

The Union and amici, in the final analysis, would like to allow employers to pay former employees *for service as union officials*. But the statute *only* speaks to payments due and owing former employees *for service as employees*.¹⁸ While paying for service of a former employee *to the union* may be an intriguing notion, it is not permitted by § 302(c)(1). Payments are permissible under § 302(c)(1) only if they are for or because of service the representative provides as a current employee or service he previously provided when he once was a current employee. A payment

¹⁷ (...continued)

docking employees for brief periods of time spent in conference . . ." BASF Wyandotte Corp., 274 NLRB 978, 980 (1985).

¹⁸ The text clearly contemplates the provision of service in two different capacities: as a union representative and as an employee of the employer. Section 302(c)(1) allows an employer to pay "any representative . . . , who is also an employee or former employee" for or because of "his service as an employee." After introducing both concepts, section 302(c)(1) allows pay only for service as an employee.

the representative receives from a past employer does not qualify under § 302(c)(1) if it is actually for or because of service he is currently providing for a new employer—to wit, the Union. The Union's problem here is that the full-time Committeemen are obviously being paid wages directly in exchange for services they are performing on a day-in and day-out, year-in and year-out basis *for the Union*.

All the Union's contortions suffer an obvious defect. Regardless of whether Congress intended to connote a difference between payments "by reason of" as distinct from payments "as compensation for" or whether Congress intended to address all payments "as compensation"—i.e., "compensation for" or "compensation . . . by reason of"—in *either* case, Congress only allowed for compensation (wage or non-wage) for "service as an employee of such employer." The language is inescapable.

Beyond reading out the substantive nexus requirement of § 302(c)(1), the position espoused by the UAW continues to proliferate the most amorphous pronouncements of what § 302(c)(1) is really all about. Worse, no one seems to agree:

- The Departments of Justice and Labor first declare that § 302(c)(1) allows something called "non-compensatory payments" (whatever they are) (DOJ/DOL Br. at 14), and then admit that this will still entail an apparently case-by-case "additional inquiry" to ensure that the "noncompensatory payments" are by reason of "prior service" "rather than 'by reason of something else.'"¹⁹

¹⁹ How this case-by-case "additional inquiry" will occur is a mystery. Elsewhere the government observes that it does *not* require a reporting union to disclose the existence of payments to union officials pursuant to a collective bargaining agreement. (DOJ/DOL Br. at 19). The government thus has no way of knowing that an "additional inquiry" must be made. This is particularly perplexing (continued...)

- The government elsewhere declares that the "by reason of" language "requires more than that the payment would not be made 'but for' the recipient's status as an employee. DOJ/DOL Br. at 17. This, it should be noted, contradicts the government's position below where it argued that "the *critical issue* is whether the persons who receive payments *has ever been* in the 'service' of the employer." (DOJ/DOL 3d. Cir. Br. at 15). Be that as it may, the government now declares that "the payments [must] *reflect a connection* not simply to the status of being an employee but to one's 'service' as an employee" (DOJ/DOL Br. at 17). As to *what* that "connection" consists of, the government contradicts itself within two pages. First, it declares that inclusion in a collective bargaining agreement "has long been treated as significant . . ." (*Id.* at 18). Then, it declares that inclusion in a collective bargaining agreement "would amount to little more than a 'but for' test." *Id.* at 19.
- The AFL-CIO, on the other hand, proposes an interpretation of § 302(c)(1) where the test is whether the officials "were *chosen* to fill their positions 'by reason of [their] service as an employee of such employer.'" AFL-CIO Br. at 6. Thereafter, the AFL-CIO seems to attribute importance to whether the "employer or the employees *perceives* the compensation as *flowing* to the elected representative by virtue of their representational role, rather than by virtue of their status as employees as of the time they are chosen to serve." *Id.* at 19.
- AAMA's members don't seem to espouse any test at all. They just want to keep supplying money to "trained" union officials rather than rank-and-file personnel.

¹⁹ (...continued)

because the government contends that "inclusion in a collective bargaining agreement does not end [the inquiry]." *Id.* It would seem in reality the "inquiry" never gets started at all.

All of this linguistic "double speak" reveals that, at the core, if § 302(c)(1) is not given its plain and straightforward meaning, then it ends up with no meaning at all.

G. The Full-Time Committeemen are Former Employees of Caterpillar and Current Employees of the Union

Despite the holdings of the District Court and the majority and dissenting opinions of the Third Circuit, the UAW continues to claim the full-time Committeemen are current employees of Caterpillar within the meaning of § 302(c)(1). The UAW cites *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) as support for its claim.

Pittsburgh Plate Glass provides little, if any, support for the Union's argument.²⁰ Be that as it may, the Union's claim that the full-time Committeemen are actually current

²⁰ The UAW argues that the term "employee" has the same meaning in §302 as it does under the NLRA. UAW Br. at 20 n. 21. But *Pittsburgh Plate Glass* did not accept this argument. 404 U.S. at 170. The Court also held:

[Retirees] were not and could not be "employees" included in the bargaining unit . . . Although those terms may include persons on temporary or limited absence from work, such as an employee on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

Id. at 172 (emphasis added).

Here, the full-time Committeemen are not on temporary or limited absence from work. Cir. App. at 168. As the Third Circuit held in *Trailways*, 785 F.2d at 107:

There is a sound distinction between payments made to a union official who goes on temporary leave to conduct union business and then returns to active employment and payments on behalf of union officials who are on full-time leave but who may never return to full-time employment of his employer. (emphasis in original).

Caterpillar employees is most tellingly contradicted by its contention that its international representatives, who also worked for Caterpillar, *somehow are not*. UAW Br. at 5. Under Articles 14.10 and 14.11 of the Central Agreement, an employee who is elected or appointed to a position with the Union is granted an unpaid leave of absence for the period of such service. J.A. at 36-38. For example, UAW International Representative Jay Roberts, Local 786's former president, and a former Caterpillar employee, testified that he is an employee of the UAW—not Caterpillar, Cir. App. at 452, despite the fact that he is on leave of absence from the Company and, under 14.6, 14.10 and 14.11 of the Central Agreement, continues to accrue seniority and can return to Caterpillar, if and when his appointment is ended. J.A. at 35-38.

Like the international representatives, full-time committeemen are full-time employees of the Union. They are issued paychecks by the Union, Cir. App. at 617; they work exclusively for the Union; the Union determines their tenure; and they perform their services for the Union's benefit. Cir. App. at 173-74, 176-79, 183-90, 617-21; J.A. at 3-10; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7. Therefore, just as the international representatives on leaves of absence from Caterpillar are not current Company employees, neither are the full-time Committeemen. Conversely, if the Union's interpretation of § 302(c)(1) is correct, then an employer, like Caterpillar, could also agree, or be *compelled* to agree, to pay the wages of international representatives, business agents or union presidents on leave of absence on the theory that they too are current [or former] employees paid "by reason of" their "service as current or former employees." UAW Br. at 20.

CONCLUSION

The "practice" of paying full-time union agents to serve in representational capacities under the guise that they are "current" or "former" employees has stretched § 302(c)(1) beyond all recognition. The instant case may represent its most extreme expression when one considers that the full-time agents in question were based *outside* the work place and were paid virtual full-time salaries to perform *all functions* related to their offices with only certain limited exceptions. It is time to draw the line. Otherwise, the slippery slope will keep employers and unions sliding toward the abyss. Notwithstanding the AFL-CIO's fear that members "are unlikely to vote to tax themselves . . . in the form of higher dues payments to finance the cost of in-plant representatives," AFL-CIO Br. at 20, that *should be* the members' decision. Members should pay for union officials, if they so choose, through members' dues dollars, *not* hidden taxes on the wages of all employees.

The decision of the Third Circuit should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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ON WRIT OF CERTIORARI
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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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4799

QUESTION PRESENTED

Whether Section 302(c)(1) of the Labor Management Relations Act, 1947, 29 U.S.C. 186(c)(1), permits an employer to agree, as part of a collective bargaining agreement, to pay an employee or former employee for time spent handling grievance matters for other employees when that individual is considered to be on a leave of absence by virtue of his election to be the plant's full-time grievance chairman.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument:	
The payments in this case are lawful under Section 302(c)(1) of the LMRA	11
A. The payments are "by reason of" the grievance chairman's service as an employee	12
B. The payments in this case are analogous to common "no-docking" arrangements	22
C. The history and purpose of Section 302(c)(1) support the court of appeals' ruling	26
D. The policy of the LMRA would be furthered by application of Section 302 to permit the payments at issue here	27
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Aeronautical Indus. Dist. Lodge 727 v. Campbell</i> , 337 U.S. 521 (1949)	20
<i>Allied Chem. Workers v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971)	13
<i>American Fed. of Gov't Employees v. FLRA</i> , 798 F.2d 1525 (D.C. Cir. 1986)	30
<i>Arizona Portland Cement Co.</i> , 302 N.L.R.B. 36 (1991)	23
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959)	12, 18, 26
<i>Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters</i> , 459 U.S. 519 (1983)	15
<i>Axelson, Inc. v. NLRB</i> , 599 F.2d 91 (5th Cir. 1979)	23

IV

Cases—Continued:

Page

<i>BASF Wyandotte Corp.</i> , 274 N.L.R.B. 978 (1985), enforced, 798 F.2d 849 (5th Cir. 1986)	23
<i>BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union</i> , 791 F.2d 1046 (2d Cir. 1986)	23, 26, 27
<i>Bingler v. Johnson</i> , 394 U.S. 741 (1969)	14
<i>Bureau of Alcohol, Tobacco & Firearms v. FLRA</i> , 464 U.S. 89 (1983)	30
<i>Caterpillar Tractor Co., In re</i> , 2 War Labor Rep. 75 (1942)	23
<i>Communications Workers v. Bell Atl. Network Servs., Inc.</i> , 670 F. Supp. 416 (D.D.C. 1987)	16, 23
<i>Dairylea Cooperative Inc.</i> , 219 N.L.R.B. 656 (1975) ..	21
<i>Davis v. Michigan Dep't of Treasury</i> , 489 U.S. 803 (1989)	14
<i>Douglas v. Argo-Tech Corp.</i> , 113 F.3d 67 (6th Cir. 1997)	19
<i>Foster v. Dravo Corp.</i> , 420 U.S. 92 (1975)	14
<i>Garcia v. United States</i> , 469 U.S. 70 (1984)	12
<i>Gulton Electro-Voice, Inc.</i> , 266 N.L.R.B. 406 (1983), enforced <i>sub nom. Local 900, Int'l Union of Elec. Workers v. NLRB</i> , 727 F.2d 1184 (D.C. Cir. 1984)	21
<i>Herrera v. International Union, UAW</i> : 858 F. Supp. 1529 (D. Kan. 1994), aff'd, 73 F.3d 1056 (10th Cir. 1996)	23
73 F.3d 1056 (10th Cir. 1996)	23
<i>Holmes v. SIPC</i> , 503 U.S. 258 (1992)	15
<i>IBEW Local 2154 v. National Fuel Gas Distrib. Corp.</i> , 16 Employee Benefits Cas. (BNA) 2018 (W.D.N.Y. 1993)	23
<i>International Harvester Co., In re</i> , 1 War Labor Rep. 112 (1942)	19, 23
<i>International Union, UAW v. CTS Corp.</i> , 783 F. Supp. 390 (N.D. Ind. 1992)	23

V

Cases—Continued:

Page

<i>Mead v. Retail Clerks Int'l Ass'n</i> , 523 F.2d 1371 (9th Cir. 1975)	15
<i>Midstate Tel. Corp. v. NLRB</i> , 706 F.2d 401 (2d Cir. 1983)	23
<i>National Fuel Gas Distrib. Corp.</i> , 308 N.L.R.B. 841 (1992)	16
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	23, 27
<i>NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.</i> , 767 F.2d 1100 (1985), on reh'g, 783 F.2d 1121 (4th Cir.), cert. denied, 479 U.S. 984 (1986)	21
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975) .	21
<i>NLRB v. Local 1131</i> , 777 F.2d 1131 (6th Cir. 1985)	21
<i>NLRB v. Milk Drivers & Dairy Employees, Local 338</i> , 531 F.2d 1162 (2d Cir. 1976)	21
<i>NLRB v. Niagara Machine & Tool Works</i> , 746 F.2d 143 (2d Cir. 1984)	21
<i>NLRB v. Town & Country Elec., Inc.</i> , 116 S. Ct. 450 (1995)	13
<i>NLRB v. Wayne Transportation</i> , 776 F.2d 745 (7th Cir. 1985)	21
<i>Sunnen Prods., Inc.</i> , 189 N.L.R.B. 826 (1971)	23
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989)	16
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council of Amalgamated Transit Union</i> , 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932 (1986)	6, 25
<i>Tresca Bros. Sand & Gravel, Inc. v. Truck Drivers Union, Local 170</i> , 19 F.3d 63 (1st Cir. 1994)	15
<i>United States v. Carter</i> , 353 U.S. 210 (1957)	14
<i>United States v. Donovan</i> , 339 F.2d 404 (7th Cir. 1964), cert. denied, 380 U.S. 975 (1965)	11
<i>United States v. Enmons</i> , 410 U.S. 396 (1973)	29
<i>United States v. Kaye</i> , 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977)	29

VI

Cases—Continued:	Page
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459 (1915)	29
<i>United States v. Motzell</i> , 199 F. Supp. 192 (D.N.J. 1961)	23
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir. 1994), cert. denied, 514 U.S. 1003, amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995)	29
<i>United States v. Ryan</i> , 350 U.S. 299 (1956)	26
<i>United Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960)	27-28
<i>Valley Rock Prods., Inc. v. NLRB</i> , 590 F.2d 300 (9th Cir. 1979)	13
Statutes and regulations:	
Civil Service Reform Act of 1978, § 701(d), 5 U.S.C. 7131(d)	29, 30
Clayton Act, 15 U.S.C. 12 <i>et seq.</i>	15
Fair Labor Standards Act of 1938, 29 U.S.C. 201 <i>et seq.</i>	21
Labor Management Relations Act, 1947, 29 U.S.C. 141 <i>et seq.</i> :	
§ 1(b), 29 U.S.C. 141(b)	27
§ 302, 29 U.S.C. 186	<i>passim</i> , 1a
§ 302(a), 29 U.S.C. 186(a)	1, 6, 8, 9, 11, 12, 28, 1a
§ 302(a)(1), 29 U.S.C. 186(a)(1)	1, 11, 1a
§ 302(a)(2), 29 U.S.C. 186(a)(2)	1, 11, 1a
§ 302(b), 29 U.S.C. 186(b)	11, 2a
§ 302(c), 29 U.S.C. 186(c)	11, 17, 2a
§ 302(c)(1), 29 U.S.C. 186(c)(1)	<i>passim</i> , 2a
§ 302(d)(2), 29 U.S.C. 186(d)(2)	2, 7a
§ 302(e), 29 U.S.C. 186(e)	2, 7a
§ 303(a), 29 U.S.C. 187(a)	15
§ 303(b), 29 U.S.C. 187(b)	15
§ 501(3), 29 U.S.C. 142(3)	13
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 <i>et seq.</i>	16
29 U.S.C. 432(a)(6)	2, 16
29 U.S.C. 433(a)(1)	2, 17

VII

Statutes and regulations—Continued:	Page
National Labor Relations Act, 29 U.S.C. 151 <i>et seq.</i> :	
§ 2(3), 29 U.S.C. 152(3)	13
§ 8(a)(1), 29 U.S.C. 158(a)(1)	5, 8a
§ 8(a)(2), 29 U.S.C. 158(a)(2)	24, 27, 8a
§ 8(a)(3), 29 U.S.C. 158(a)(3)	5, 8a
§ 8(a)(5), 29 U.S.C. 158(a)(5)	5, 9a
§ 8(b)(2), 29 U.S.C. 158(b)(2)	5
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 <i>et seq.</i>	15
26 C.F.R. 1.61-21(a)(3)	14
29 C.F.R. 785.42	24
Miscellaneous:	
<i>Basic Patterns in Collective Bargaining Contracts</i> (BNA ed. 1948)	26
<i>Black's Law Dictionary</i> (6th ed. 1990)	13, 14, 15
93 Cong. Rec. (1947):	
pp. 4677-4680	26
p. 4678	26
pp. 4745-4754	26
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)	26, 27
H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947)	26
Letter from Administrator, Wage and Hour Division, U.S. Dep't of Labor, to Edward T. O'Hara (Apr. 6, 1949)	21, 24
<i>The Random House Dictionary of the English Language</i> (2d ed. 1987)	14, 15
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U.S. Dep't of Labor, Bureau of Labor Statistics, <i>Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business</i> (1980)	19, 28, 30
U.S. Dep't of Labor, Office of Labor-Management Standards, Instructions for Preparing the Labor Organization Office and Employee Report (1986) ..	17
<i>Wage and Hour Manual</i> (BNA) (1948)	24

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**BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

Section 302(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(a), generally prohibits an employer from paying, or agreeing to pay, any money or thing of value to any representative of his employees, any union, or any union officer. 29 U.S.C. 186(a)(1)-(2). Section 302(c)(1), 29 U.S.C. 186(c)(1), makes an exception to that prohibition for payments made as compensation for, or by reason of, an employee's service as an employee of the employer. The issue in this case is whether Section 302(c)(1) permits an employer to agree, as part of a collective bargaining agreement, to pay an employee or former employee for time spent handling grievance mat-

ters for other employees at the employer's plant, when that individual is considered to be on a leave of absence by virtue of having been elected the full-time grievance chairman at the plant. Willful violations of Section 302 constitute criminal offenses, 29 U.S.C. 186(d)(2), and federal district courts may restrain violations of Section 302, 29 U.S.C. 186(e). The proper interpretation of Section 302 also bears on the Department of Labor's administration of public reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 432(a)(6), 433(a)(1). The United States filed a brief as amicus curiae in the court of appeals.

STATEMENT

1. Petitioner Caterpillar, Inc., is engaged in the manufacture, sale, and distribution of heavy equipment at plants throughout the United States. Since 1954, Caterpillar and the respondent unions (collectively "UAW") have been parties to a series of collective bargaining agreements covering Caterpillar employees, including employees at Caterpillar's plant in York, Pennsylvania. Pet. App. 4a, 49a. The parties' agreements have always contained detailed procedures for handling employee grievances satisfactorily and in an expedient manner, with the union serving as the advocate for employees involved in the disputes. The agreements also have always contained a "no-docking" provision, that is, a provision allowing employees who are also union representatives, such as stewards and grievance committeemen, to leave their jobs to handle grievance-related matters for other employees "without loss of pay and while maintaining their status as full-time Caterpillar employees." *Id.* at 50a, *id.* at 4a; J.A. 44. Under the most recent agreement, approximately 108 stewards (one per foreman) and nine committeemen (three for each of the three shifts) are

granted such leave at the York plant to handle grievance matters on a part-time basis. J.A. 5-6, 43, 44.

Since 1973, the parties' agreements have recognized the grievance committee chairman as a full-time position and have considered chairmen to be on a leave of absence from Caterpillar. J.A. 58. Under the agreement, Caterpillar pays a chairman for his regular shift hours, at his regular hourly rate, adjusted for general increases and cost of living. J.A. 14-15.¹ The chairman also retains his insurance, pension, and unemployment benefits, as well as his seniority status as an employee. J.A. 15. The chairman has a right to return to active duty work when he leaves the chairman position and, under the collective bargaining agreement, Caterpillar must "promptly return to work an employee who is able to return from leave of absence." J.A. 35. At the York plant, such full-time leaves of absences are authorized for two individuals, a grievance committee chairman and an alternate chairman. J.A. 14-15; Pet. App. 50a.²

The grievance chairman, like the stewards and committeemen, is elected by the employees in the bargaining unit. To be eligible for election, a candidate must be an employee in the bargaining unit. J.A. 6. The responsibilities of the grievance chairman include: investigating and/or handling second, third, and final step grievances; participating in joint investigations; consulting with certain union officials about disposition of denied grievances; and taking part in certain other joint labor-management

¹ The parties agreed that Caterpillar would pay six additional hours in a workweek (equivalent to four hours' overtime at time-and-one-half pay) when the chairman spends eight or more hours that week handling grievance matters. J.A. 61.

² The alternate acts in the place of the absent chairman or an absent committeeman and assists the chairman in his regular duties. J.A. 43. Like the courts and parties below, we refer to the chairman and the alternate collectively as the chairman.

activities mutually agreed upon, such as informal discussions and meetings to try to resolve issues before a formal grievance is filed. J.A. 13-15. The grievance chairman also performs some union work that the collective bargaining agreement does not treat as related to grievance matters. Caterpillar does not pay him for time spent on such work. Pet. App. 57a.³ Caterpillar also provides unpaid leave to other employees to attend union meetings and to meet with company representatives and provides temporary leaves of absences for employees to attend union conferences. J.A. 37.

The term of office for the grievance chairman is three years. C.A. App. 646. During the period at issue in this case, the grievance chairman at the York plant was a Caterpillar employee who had been first elected to the position in 1990. Respondents' evidence indicated that, at that time, the chairman had more than 21 years of service with Caterpillar, including part-time committeeman work for nine years. J.A. 54, 82-83.

2. a. In November 1991, the parties' most recent collective bargaining agreement expired. The UAW and several locals began a strike, and Caterpillar locked out employees at certain plants. In April 1992, the UAW recessed the strike. The employees returned to work under the terms of the implemented proposal of Caterpillar, which included the substance of the grievance process described above. Pet. App. 76a.

On October 30, 1992, Caterpillar informed the UAW by letter that, "effective November 16, 1992, and continuing until a new agreement is reached," it would unilaterally cease paying wages and providing insurance coverage to

³ Specifically, Caterpillar does not pay the grievance chairman for time spent in "(i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union office, or (iv) any activity not directly related to the functions of his office." J.A. 14.

the various grievance chairmen. J.A. 49; Pet. App. 50a. A Caterpillar official later explained that the letter was an effort to "put economic pressure on the Union" and to support Caterpillar's bargaining position. C.A. App. 144, 162. The letter also stated that "stewards and part-time committeemen employed by the Company who are responsible for processing grievances for our employees on an as-needed basis during the workday, will continue to be paid by the Company without any docking of pay for time properly spent in grievance administration." J.A. 49.

b. On November 17, 1992, the UAW filed an unfair labor practice charge with the National Labor Relations Board (NLRB). The charge alleged that Caterpillar, by unilaterally stopping its previous practice of paying wages and benefits to certain employees who are elected by the union membership to handle grievances full time, had refused to bargain in good faith, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5). Pet. App. 4a, 50a-51a, 73a. After learning that the NLRB's General Counsel intended to file a complaint if settlement was not imminent, Caterpillar filed the instant action against the UAW seeking a declaration that Caterpillar's "payment of wages and benefits to the Union's full-time Committeemen would violate § 302(1) [sic] of the LMRA, [and] directing [respondents] not to require Caterpillar to make such payments to its full-time Committeemen." C.A. App. 87-88; Pet. App. 51a.

The district court stayed its proceedings pending the NLRB proceeding. On January 31, 1995, the NLRB administrative law judge (ALJ) recommended dismissal of the complaints against Caterpillar. Pet. App. 72a-86a. The ALJ concluded that the payments are facially discriminatory, in violation of Section 8(a)(3) and (b)(2) of the NLRA, 29 U.S.C. 158(a)(3) and (b)(2). The ALJ did

not reach Caterpillar's defense that the payments violated Section 302 of the LMRA. Pet. App. 82a. The General Counsel appealed, and the NLRB has not yet ruled on the ALJ's recommendation.

3. After issuance of the ALJ's ruling, the district court lifted its stay and granted summary judgment to Caterpillar. Pet. App. 49a-65a. The court determined that the payments to the grievance chairman would be unlawful under Section 302(a) of the LMRA unless authorized under the exception set forth in Section 302(c)(1). See Pet. App. 53a-54a. The district court ruled that, under *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932 (1986), the payments are not covered by the Section 302(c)(1) exception. The court found that the grievance chairman and alternate are former, not "current and active," Caterpillar employees, because Caterpillar did not exercise sufficient control over them (Pet. App. 56a-59a) and because they were not performing services for the benefit of Caterpillar (*id.* at 59a-60a). The court then concluded that the wages paid the chairman "are not for services rendered while he was an employee of Caterpillar." *Id.* at 61a.

The district court noted that respondents had argued that the invalidation of the payments would not further the goals of Section 302 and that the payments of the sort at issue in this case "are commonplace today and have been so for many years." Pet. App. 62a n.16. The court acknowledged that the purpose of Section 302 was "to 'prevent bribery, extortion, shakedowns, and other corrupt practices,'" and that its decision "could have far reaching effects on not just these parties, but on other employer/labor union relationships." *Ibid.* The court

ruled, however, that, under *Trailways*, "the proposed payments are unlawful." *Ibid.*⁴

4. The en banc court of appeals reversed by a 9-3 vote. Pet. App. 1a-44a. The court accepted the conclusion that, under *Trailways*, grievance chairmen are not current employees and that wages to them are "not in compensation for their past services rendered as production employees." *Id.* at 8a. The court overruled *Trailways*, however, to the extent that its analysis required the conclusion that the payments to grievance chairmen are not "by reason of" their prior service as employees of Caterpillar. Instead, the court held that such payments are "by reason of" that service and are therefore protected under Section 302(c)(1). *Ibid.*

The court held that the *Trailways* panel had erred in interpreting the "by reason of" provision to exempt "only those payments for past services actually rendered while the former employee was still employed by the company." Pet. App. 8a. The court explained that, under that approach, even the "no-docking" provision for part-time grievance handling found in many collective bargaining agreements, including the instant parties' contract, would fail to satisfy Section 302(c)(1). The employer's payment of regular hourly wages to union members who are called away from production work to handle grievances is payment for services not actually rendered to the employer, the court stated, yet "no-docking arrangements have been consistently upheld by

⁴ The district court rejected the UAW's contention that Caterpillar's claim is moot, concluding that, although there is no current contract between the parties, the parties are negotiating a new contract and "this issue is, undoubtedly, part of that process and is not moot." Pet. App. 54a n.7. The court also ruled that Caterpillar's claim was not barred by a six-month statute of limitations or the doctrine of laches because the complaint did not seek redress for past payments, but sought a declaration that future payments would be unlawful under Section 302. *Ibid.*

the courts as not in violation of § 302.” *Id.* at 9a (citing cases). The court added that “it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime.” *Id.* at 9a-10a.

The court concluded that the payments at issue here are “by reason of” the employees’ past service for Caterpillar because the payments arose out of the collective bargaining agreement that contains the terms of workers’ employment. In the court’s view, whether a payment is owed because of service as an employee depends on the terms of the contract. Pet. App. 10a-11a. The court emphasized that a collective bargaining agreement “does not immunize otherwise unlawful subjects but, by defining the basis for the payments, speaks directly to the question posed by the statute as to whether the payments are ‘compensation for, or by reason of[,] * * * service as an employee.’” *Id.* at 11a-12a. The court also concluded that “no-docking” provisions could not be persuasively distinguished from the payments at issue here. *Id.* at 12a. Finally, the court noted that the payments in this case do not pose the kind of harm that Congress contemplated when it enacted the LMRA, such as “bribery, extortion, and other corrupt practices conducted in secret.” *Ibid.* It concluded that, “[w]ithout explicit statutory direction from Congress, we cannot condemn these payments as criminal.” *Ibid.*

Judge Mansmann filed a dissenting opinion in which she argued that the language of Section 302(c)(1) does not encompass the payments at issue here, and that the legislative history and purpose of Section 302 support that conclusion. Pet. App. 12a-30a (Mansmann J., joined by Greenberg, J., dissenting). Judge Alito filed a separate dissent, noting that the payments at issue differ from the corrupt practices usually at issue in Section 302

prosecutions and stating that he was “not certain that the Congress that enacted Section 302 would have chosen to outlaw such payments if it had focused specifically on that question.” *Id.* at 30a. He nevertheless concluded that they are prohibited by the language of Section 302. *Ibid.*

SUMMARY OF ARGUMENT

Section 302(a) of the Labor Management Relations Act, 1947 (LMRA) generally prohibits an employer from paying, or agreeing to make payments to, any representative of its employees. Section 302(c)(1) makes an exception to that prohibition for payments to a representative of the employer’s employees or a union officer who is also an employee or former employee of the employer “as compensation for, or by reason of, his service as an employee of such employer.” 29 U.S.C. 186(c)(1). The payments to the grievance chairman at issue in this case fit within that exception because they are made “by reason of” the chairman’s service as an employee of Caterpillar.

Whether a payment is “by reason of” an individual’s service as an employee requires an inquiry into the relationship between the service and the payments. An employer’s agreement to make a payment to an employee or former employee as part of a collective bargaining agreement normally gives rise to a presumption of validity under Section 302(c)(1), because such a bargaining agreement generally defines the compensation and other benefits to which employees are entitled by virtue of their service. Payments made under a collective bargaining agreement to union representatives who are also employees or former employees of the employer are not, however, per se lawful. Rather, a payment that is ostensibly made by reason of service is unlawful if that reason is a sham, or a corrupt effort to hide a bribe or improperly influence a union official.

The payments at issue here meet the "by reason of" requirement of the statute. The grievance chairman would not be entitled to receive the payments from Caterpillar but for his service as a Caterpillar employee; only an employee may be elected to the position as grievance chairman. And the justification and context of the agreement to make the payments confirm that they are by reason of that service with Caterpillar.

The circumstances surrounding enactment of the LMRA support the conclusion that Section 302(c)(1) permits the payments at issue here. There is no evidence of a congressional intent to prohibit collective bargaining arrangements enabling employees to leave service on a plant floor, without sacrificing pay and other benefits, in order to assume full-time grievance handling responsibilities. Indeed, such arrangements are substantially similar to no-docking provisions in collective bargaining agreements, under which shop stewards may leave their work on the plant floor to process employee grievances without losing pay, and with which Congress was quite familiar and approved. To declare all such arrangements to be unlawful would disrupt longstanding and common patterns of dealing that have formed an integral part of the administration of collective bargaining agreements. Permitting the payments at issue, in contrast, would promote a goal of the LMRA to provide orderly and peaceful procedures for resolution of labor-management disputes.

ARGUMENT

THE PAYMENTS IN THIS CASE ARE LAWFUL UNDER SECTION 302(c)(1) OF THE LMRA

Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits the payment of, or agreement to pay, "any money or other thing of value" to "any representative of any of [an employer's] employees," or to any "labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer." 29 U.S.C. 186(a)(1) and (2). Section 302(b) provides a counterpart prohibition making it unlawful for any person to receive "any money or other thing of value" prohibited by Section 302(a). 29 U.S.C. 186(b). Those prohibitions are qualified by the nine exceptions listed in Section 302(c).⁵ The first of these, Section 302(c)(1), exempts "any money or thing of value payable by an employer * * * to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1).

This case deals with the common and longstanding practice in certain industries of continuing the pay and benefits of an employee who, pursuant to a collective bargaining agreement, handles grievance matters for employees at a plant on a full-time basis and is considered to be on a leave of absence. Where such payments are proportionate to the employee's prior service, are made

⁵ The Section 302(c) exceptions to the Section 302(a) and (b) prohibitions are recognized as defenses to criminal prosecution, and the government must disprove those defenses if (but only if) the defendant meets his burden of production and some facts supporting the exception have been admitted into evidence. *United States v. Donovan*, 339 F.2d 404, 409-410 (7th Cir. 1964), cert. denied, 380 U.S. 975 (1965).

to a person who is not engaged principally in union business other than contract administration, and are not a sham or a corrupt effort to conceal bribes or other improper inducements, Section 302(c)(1) permits such payments as being "by reason of" the employee's prior service to the employer. The contrary conclusion urged by petitioner—that such payments are per se illegal—would call into question the legality of provisions in collective bargaining agreements that are and have long been in widespread use.

A. The Payments Are "By Reason Of" The Grievance Chairman's Service As An Employee

1. Section 302 responded to congressional concern "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted). The class of prohibited payments is broad. See 29 U.S.C. 186(a). Recognizing the legitimacy of certain payments made to union representatives who are also employees or former employees, however, Congress provided an exception in Section 302(c)(1) to permit the payment to a union representative of "money or thing of value * * * as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1) (emphasis added). According to basic canons of statutory construction, phrases connected in the disjunctive are given separate meanings. *Garcia v. United States*, 469 U.S. 70, 73 (1984). A plain reading of the first phrase, "as compensation for," permits the giving of money or things of value to a union official as remuneration earned by hours worked in service as an employee. The second phrase, "by reason of," permits something

else—noncompensatory payments, i.e., the giving of money or things of value on account of, and because of, the union official's service as an employee.⁶

Petitioner would limit Section 302(c)(1) to "payments * * * for past services actually rendered," the validity of which turns on the relationship of such payments to "the value of the actual services rendered." Pet. Br. 23, 24. Petitioner's interpretation reads "by reason of" out of Section 302(c)(1). Payments that are directly related to the value of the actual services rendered fall within the standard definition of "compensation." See *Black's*

⁶ As the district court noted (Pet. App. 55a n.10), it is not necessary to determine whether the grievance chairman and the alternate are "employees" or "former employees" of Caterpillar. All agree that they are one or the other, and Section 302(c)(1)'s exception applies to both. Nonetheless, the district court concluded (*id.* at 56a), and the court of appeals apparently agreed (*id.* at 7a), that the chairman and alternate are former employees, not current employees. In that connection, the court of appeals noted that the chairman and alternate perform no services for Caterpillar and are not under the company's control. *Id.* at 7a.

That analysis does not give proper weight to the fact that the chairman and alternate have not severed their ties with Caterpillar, but are considered to be on leaves of absence. The term "employee," as used in Section 302 of the LMRA, has the same meaning as under the NLRA, see 29 U.S.C. 142(3), 152(3). Under the NLRA, "[t]here is a presumption that an employee granted a leave of absence is still an employee." *Valley Rock Prods., Inc. v. NLRB*, 590 F.2d 300, 303 (9th Cir. 1979) (employee who was self-employed while on leave of absence presumed still to be an employee); see also *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) (although retirees not considered "employees" under NLRA because they have ceased all work with no expectation of return, governing agreement that covered employees under the NLRA if they work "on hourly rates of pay * * * may include persons on temporary or limited absence from work, such as employees on military duty"). Employment by the union does not foreclose the grievance chairman from also being an employee of Caterpillar. *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 455 (1995). Although the presumption of continuing employee status for an employee on leave of absence would be subject to rebuttal, no such rebuttal has been made here. In any event, the resolution of the current-versus-former employee issue need not affect the outcome of this case.

Law Dictionary 283 (6th ed. 1990) ("giving an equivalent or substitute of equal value"); *The Random House Dictionary of the English Language* 417 (2d ed. 1987) (def. 3: "something given or received as an equivalent for services, debt, loss, * * * etc.").

In an effort to give meaning to the "by reason of" provision, petitioner suggests (Br. 21-22) that the term "compensation" is limited to wages, thus permitting "by reason of" to be read to apply to fringe benefits. Restricting "compensation" in that manner, however, ignores the meaning of compensation in other legal contexts, where fringe benefits are viewed as an integral part of compensation. See, e.g., *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 (1989) (retirement benefits are deferred compensation); *Foster v. Dravo Corp.*, 420 U.S. 92, 99-100 (1975) (vacation benefits held to be deferred compensation "for work actually performed"); *Bingler v. Johnson*, 394 U.S. 741 (1969) (employer-funded educational leave of absence is taxable compensation); *United States v. Carter*, 353 U.S. 210, 217-218 (1957) (surety obligated to make contributions to health and welfare fund under a collective bargaining agreement as part of compensation for "work done"); see also 26 C.F.R. 1.61-21(a)(3) ("A fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for such services."). The "by reason of" clause, therefore, cannot be restricted to payments that are readily understood as covered by the "compensation" clause.

2. a. Whether payments, such as the payments to the York plant grievance chairman at issue in this case, are "by reason of * * * his service as an employee" of Caterpillar requires an inquiry into the causation between the service as an employee and the payments. "Because of" is the most common meaning of "by reason of." *Black's Law Dictionary*, *supra*, at 201; *Random House*

Dictionary, *supra*, at 1608 ("reason" def. 9: "by reason of, on account of; because of: *He was consulted about the problem by reason of his long experience.*").

The degree of causation required under a statute using the "by reason of" construction is informed by the context. "By reason of" can mean simply "but for" causation. *Holmes v. SIPC*, 503 U.S. 258, 265-266 (1992). In the context of civil RICO and Clayton Act suits for treble damages, however, the Court has interpreted the phrase to require a greater showing of causation, i.e., that connoted by the common law requirement of "proximate cause." *Id.* at 268 ("by reason of" under RICO requires proof of "proximate cause"); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 533-536 (1983) (same, under Clayton Act).⁷ In the context of Section 302(c)(1), "by reason of" similarly requires more than that the payment would not be made "but for" the recipient's status as an employee; it demands that the payments reflect a connection not simply to the status of being an employee or a former employee, but to one's "service" as an employee.

In the employment context, "service" generally is "[t]he act of serving the labor performed or the duties required" under a contract. *Black's Law Dictionary*, *supra*, at 1368. Consistent with that premise, courts have stated that "[o]ne obvious instance in which continuing

⁷ By the same token, under Section 303(b) of the LMRA, 29 U.S.C. 187(b), suit may be brought by "[w]hoever shall be injured in his business or property *by reason of* any violation of [Section 303(a)]" (emphasis added), which prohibits certain unfair labor practices by a labor organization, 29 U.S.C. 187(a). The First Circuit, following the Ninth Circuit, has interpreted "by reason of" in that context to require "conduct [that] 'materially contributes' to the injury or is a 'substantial factor' in bringing it about." *Tresca Bros. Sand & Gravel, Inc., v. Truck Drivers Union, Local 170*, 19 F.3d 63, 65 (1st Cir. 1994) (quoting *Mead v. Retail Clerks Int'l Ass'n*, 523 F.2d 1371, 1376 (9th Cir. 1975)).

payments constitute recompense for past services is when those continuing payments were bargained for and formed part of a collective bargaining agreement." *Toth v. USX Corp.*, 883 F.2d 1297, 1304 (7th Cir.) (indicating that provision for continued pension credit to union members on full-time leave could be covered under Section 302(c)(1) exception if it were part of a collective bargaining agreement), cert. denied, 493 U.S. 994 (1989); see also *Communications Workers v. Bell Atl. Network Servs., Inc.*, 670 F. Supp. 416, 422 (D.D.C. 1987) (upholding legality under Section 302(c)(1) of collective bargaining agreement provisions (in effect for decades) that continue pension accrual, death benefits, and insurance based on last job with employer when employee is on leave of absence for union work); *National Fuel Gas Distrib. Corp.*, 308 N.L.R.B. 841, 844 (1992) (ruling that employer engaged in unfair labor practice by unilaterally ceasing compliance with collective bargaining agreement that provided continuation of retirement plan service credit and thrift plan eligibility for employees who had served or were serving as union officials on full-time leave of absence). By defining the nature of the service necessary to receive payments, a collective bargaining agreement speaks directly to the question posed by Section 302(c)(1). Accordingly, in ordinary circumstances, the parties' provision for a payment to an employee or former employee in a collective bargaining agreement suggests that the payment was "by reason of * * * service as an employee."

The Department of Labor has long treated inclusion in a collective bargaining agreement as significant in determining whether payments come within the Section 302(c)(1) exception. As part of its administration of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.*, the Department must make such determinations to identify payments subject

to reporting requirements under 29 U.S.C. 432(a)(6) and 433(a)(1). Those provisions generally require officers and employees of labor organizations, as well as employers, to report all payments from an employer to union officers and employees. They except, however, "payments of the kind referred to" in Section 302(c). The Department's instructions to officers and employees of labor organizations state that no payments or benefits need to be reported which are

received as a bonafide employee of the employer for past or present services * * * for periods in which such employee engaged in activities other than productive work, if the payments for such period of time are: (a) required by * * * a bona fide collective bargaining agreement, or (b) made pursuant to a custom or practice under such a collective bargaining agreement * * *.

U.S. Dep't of Labor, Office of Labor-Management Standards, Instructions for Preparing the Labor Organization Officer and Employee Report, Form LM-30, Item 5 (1986).

b. Inclusion in a collective bargaining agreement, however, does not end the inquiry into the lawfulness of payments, for that would amount to little more than a "but for" test.⁸ The provision for payments in a collective bargaining agreement does not guarantee that the provision is not a sham or otherwise impermissible. Accordingly, there will generally need to be an additional inquiry to ensure that the payments are being made "by

⁸ Of course, if the collective bargaining agreement provided for payments to *any* union grievance handler, regardless of service or former service as an employee of the employer, the payments would not even meet a "but for" causation test, and therefore could not qualify as payments "by reason of" the service of an employee or former employee.

reason of" the employee's (or former employee's) prior service, rather than "by reason of" something else.⁹

In this case, the type of payments that Caterpillar agreed to make supports the conclusion that they are "by reason of" the services as an employee.¹⁰ Caterpillar agreed to pay the wages and benefits of a full-time grievance chairman who has been elected from his bargaining unit. But for his service as an employee, the grievance chairman would not receive the payments at issue; Caterpillar does not make similar payments to union officials who perform similar functions but who are not employees or former employees of Caterpillar. Cf. J.A. 6, 46-47 (international union representative may assist in grievance process, but no provision for payment to him by

⁹ That does not mean that payments cannot be "by reason of" more than one thing. Here, for example, the chairman must be a present or former Caterpillar employee, elected from the bargaining unit; the payments are thus "by reason of" his service as an employee. To earn the payments, however, he must perform grievance handling work. In that sense, the payments are also "by reason of" that work. Section 302(c)(1) does not state, however, that the service as the employee must be the "sole" or "major" cause of the payment, as Judge Alito contends. See Pet. App. 38a, 40a. In cases where the causal connection appears as attenuated as in Judge Alito's hypotheticals (*id.* at 35a), the inquiry to ensure that a payment was made "by reason of" the employee's service to an employer would necessarily consider whether service was merely a pretext and whether the payment was a sham or otherwise impermissible. See *Arroyo*, 359 U.S. at 424 ("Both [the employer and the union official] would be guilty if the payment were ostensibly made for one of the lawful purposes specified in § 302(c) if both knew that such a purpose was merely a sham.").

¹⁰ The government's amended brief in the court of appeals suggested that the district court's grant of summary judgment be reversed and the case remanded for examination of the legality of the payments in light of the parties' collective bargaining agreement and other relevant facts bearing on their relationship. Gov't C.A. Br. 29. In this Court, Caterpillar has not requested the alternative relief of a remand for further consideration of the evidence, and we construe that position as indicative that, on remand, Caterpillar would not adduce any additional evidence to suggest that the payments at issue were illegal.

Caterpillar). The parties agreed to the payments as part of their collective bargaining agreement. Caterpillar has introduced no evidence that the payments were a sham to procure improper influence over the chairman.

Moreover, the grievance chairman's prior service is directly relevant to the nature of the leave and benefits he is afforded. Because of his service as an employee, the grievance chairman brings experience and understanding to the grievance process that would generally give him an advantage over a person without such service. The grievance chairman is already aware of the conditions in the workplace and the history of labor-management relations there, and he is elected by his fellow employees. Here, the chairman also had served previously as a part-time committeeman for approximately nine years. J.A. 82. Thus, it is reasonable to infer that a person so situated would be more efficient and successful in resolving grievances than a union representative without such service would be.

It is also reasonable to infer that, by virtue of those advantages, an employer would have an incentive to preserve an employee's wage, benefits, and seniority during a leave of absence to perform full-time grievance handling. Timely and efficient handling of grievances benefits not only the employee and the union, but also the employer. See, e.g., *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 72 (6th Cir. 1997); *In re International Harvester Co.*, 1 War Labor Rep. 112, 122 (1942); U.S. Dep't of Labor, Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business* 1 (1980) (one reason why employer would grant paid time, or leave, to an employee engaged in handling grievances is because "employer participates in and derives a benefit from * * * prompt settlement of grievances"); U.S. Dep't of Labor, Bureau of Labor Statistics, *Collective Bargaining Clauses: Company Pay for*

Time Spent on Union Business 2 (1959); cf. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 528 & n.5 (1949) (upholding agreement retaining union chairmen over returning veterans with statutory right to re-employment, because of role of chairmen and importance of grievance adjustments). A person who has gained experience as an employee in the bargaining unit would likely provide extra value to the grievance-resolution process, particularly where the individual may concentrate on that process full time, without disruption to normal plant operations.¹¹

For those reasons, payments to a full-time grievance chairman are different from payments to a union official who does not handle grievances or otherwise administer the contract. The NLRB and several circuits have upheld labor agreements that extend preferences (with respect to layoffs and job recall) to union officials who handle grievance and other contract administration, but have declined to uphold such preferences for other union officials. The NLRB has explained that "it is well established" that providing extra seniority for stewards and others administering the contract for the purpose of lay-off and recall

is proper even though it, too, can be described as tying to some extent an on-the-job benefit to union status. The lawfulness of such restricted super

¹¹ Those efficiencies may be particularly significant in this case. Respondents' evidence indicates that, before the establishment of the full-time grievance chairman, grievance chairmen, "[i]n practice, * * * often were spending full time doing their grievance-related work with little or no time left for their regular plant jobs." J.A. 59-60; but see C.A. App. 463-464 (Caterpillar disagreeing with UAW's explanation). In such circumstances, having an employee work full time on grievances is likely to be less disruptive to production than having employees "repeatedly pulled off and on the job," including some for entire days at a time. See J.A. 60.

seniority is, however, based on the ground that it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job.

Dairylea Cooperative Inc., 219 N.L.R.B. 656, 658-659 (1975) (distinguishing permissible superseniority to protect steward from layoff, from impermissible superseniority to obtain more lucrative job assignment, etc., for same steward, because latter disadvantaged other employees who were not active in union), enforced *sub nom. NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976). By contrast, the NLRB has invalidated such superseniority where the beneficiary is not a steward or otherwise involved in on-the-job grievance processing or other contract administration responsibilities. *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), enforced *sum nom. Local 900, Int'l Union of Elec. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984). See also *NLRB v. Local 1131*, 777 F.2d 1131 (6th Cir. 1985) (rule that union official can qualify for preference in lay-off and recall only if he must be on the job to perform duties directly related to administering collective bargaining agreement was reasonable); *NLRB v. Wayne Transportation*, 776 F.2d 745 (7th Cir. 1985) (same); *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100 (1985) (same), on reh'g on other grounds, 783 F.2d 1121 (4th Cir.), cert. denied, 479 U.S. 984 (1986); *NLRB v. Niagara Machine & Tool Works*, 746 F.2d 143 (2d Cir. 1984) (same); cf. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (employee entitled to have union representative present at investigatory interview that might result in disciplinary action); Letter from Administrator, Wage and Hour Division, U.S. Dept. of Labor, to Edward T. O'Hara (Apr. 6, 1949) (interpreting Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to

impose primary responsibility on employer to pay employees for time spent doing grievance work, and distinguishing payments for internal union work for which employer is not responsible).

Finally, the payments at issue here are proportionate to the benefits the chairman received when he was performing services to Caterpillar. Indeed, his seniority and benefits continue to accrue as though he were still performing such services, and his wages are commensurate with the level at which he was last paid by Caterpillar for his service on the plant floor. Continuation of the same wage and benefits payments by the employer gives an incentive to an employee to serve as a grievance committee chairman, by ensuring the employee that he will not suffer adverse consequences or compromise the status and benefits he has developed at Caterpillar, as a result of serving as the chairman. This confirms that the arrangement does not unduly compensate the chairman in his capacity as a union representative.

B. The Payments In This Case Are Analogous To Common "No-Docking" Arrangements

The payments to the full-time grievance chairman here strongly resemble the "no-docking" payments made to part-time committeemen. "Under a no-docking clause, the employer agrees that shop stewards may leave their assigned work areas for portions of a day to process employee grievances without loss of pay." Pet. App. 9a. Such payment by the employer to production workers for hours when they are not performing their regular duties may be payment "for services not actually rendered for it, since those employees are already receiving their regular hourly wages and benefits for their production line work." *Ibid.* As the court of appeals noted (*ibid.*), the NLRB and lower courts have consistently approved no-docking arrangements as encompassed within

the exception set forth in Section 302(c)(1).¹² The NLRB also has held that a union's request for a no-docking provision is a subject over which the employer must bargain in good faith and may not unilaterally alter without prior bargaining with the union.¹³ A holding that the payments in this case are unlawful under Section 302(c)(1)

¹² See, e.g., *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 855-856 (5th Cir. 1986), enforcing *BASF Wyandotte Corp.*, 274 N.L.R.B. 978, 979 (1985) (noting that interpreting Section 302 to prohibit "paid time for stewards to discuss grievances with employees would be inimical to the statutory goal of encouraging cooperative labor relations"); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1053-1054 (2d Cir. 1986); *Herrera v. International Union, UAW*, 73 F.3d 1056, 1057 (10th Cir. 1996), aff'g *Herrera v. International Union, UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *IBEW Local 2154 v. National Fuel Gas Distrib. Corp.*, 16 Employee Benefits Cas. (BNA) 2018 (W.D.N.Y. 1993); *International Union, UAW v. CTS Corp.*, 783 F. Supp. 390, 394-395 (N.D. Ind. 1992); *Communications Workers*, 670 F. Supp. at 422; *United States v. Motzell*, 199 F. Supp. 192, 194, 198 (D.N.J. 1961); see also *Sunnen Prods., Inc.*, 189 N.L.R.B. 826, 828 (1971) (receipt of regular wages by employee representatives for time spent in meetings about grievances and work conditions "not at all unusual where affiliated unions are involved and are not inherently coercive" because it serves "to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case"); *In re International Harvester Co.*, 1 War Labor Rep. at 122 (ordering inclusion in collective bargaining agreement of provision that "[u]nion representatives who are employees of the Company shall not lose pay during the time spent in handling grievances within the plant," noting that ruling is "solely in recognition of the practice in this regard among many plants making products similar to those manufactured by the International Harvester Company," and indicating that the prompt handling of grievances benefits employer); *In re Caterpillar Tractor Co.*, 2 War Labor Rep. 75, 95 (1942) ("practice of paying union representatives while they are handling grievances is very common in industry," and grievance adjustment "is business in which the union and the company are equally interested").

¹³ See, e.g., *Arizona Portland Cement Co.*, 302 N.L.R.B. 36, 44 (1991), a ruling with which two courts of appeals have agreed, *Axelsson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979); *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983).

would call into question those no-docking provisions for part-time grievance handling, thus destabilizing patterns of bargaining and settled legal standards.¹⁴

Petitioner concedes (Br. 39), as it must in light of its current practices, that it would be "appropriate to recognize a limited 'no docking' exception" for part-time grievance handlers. Petitioner notes (*ibid.*) that Section 8(a)(2) of the NLRA expressly exempts from that section's prohibition on employer payments to unions the practice of permitting "employees to confer with [their employer] during working hours without loss of time or pay." 29 U.S.C. 158(a)(2). In light of that statute, petitioner acknowledges that Section 302(c)(1) should be construed to permit agreements to pay for such time. Petitioner maintains, however, that the exception should apply only to no-docking provisions involving regular employees representing other employees on an as-needed basis during the workday, and not to full-time committee chairmen.

Petitioner's basis for distinguishing part-time no-docking arrangements from the payments at issue here is unpersuasive. "The distinction between using part of the day for union business and taking leaves of absence to become full-time union officials is only one of degree: the

¹⁴ Moreover, the Department of Labor, Administrator of the Wage and Hour Division, has long treated payment of employees and employee members of a grievance committee for time spent at grievance conferences during regular working hours to be mandated under the FLSA and subject to minimum wage and overtime restrictions. *Wage and Hour Manual* (BNA) 45:79-45:80, 45:291 (1948). As a matter of enforcement policy, where a union is involved, the counting of the hours is left to the collective bargaining process or custom thereunder, but the employer bears the ultimate responsibility for the payment. 29 C.F.R. 785.42; Letter from Administrator, *supra*. The 1947 enactment of the LMRA did not alter the Administrator's position because he viewed payments of employee representatives for time spent in grievance proceedings to be consistent with Section 8(a)(2) of the NLRA and Section 302 of the LMRA. *Wage and Hour Manual* (BNA) 45:291 (1948).

nature of the absences and the payments made by the employer during them * * * is the same." *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101, 111 (3d Cir.) (Becker, J., dissenting), cert. denied, 479 U.S. 932 (1986). Like a steward or a part-time committeeman, a full-time committee chairman gives up production work for the employer for a period of time and takes a contractual leave of absence to handle grievances, yet is typically paid at customary production rates. Also, like the part-time committeemen and stewards, the grievance chairman is entitled to return to service for the employer when the grievance chairman leaves that position.

Contrary to petitioner's characterization of the payment to the grievance chairman as a "massive wage-docking policy" (Br. 31), that payment does not reduce the wages to other members of the bargaining unit—any more than do the payments for part-time leaves to stewards and committeemen for grievance handling. In both instances, the employer may have to pay another employee to perform production work that the individual handling the grievance otherwise would have performed. See J.A. 59. Caterpillar pays the grievance chairman only for the handling of grievance-related matters, not general union business.

In short, there is no justification for having the legality of paid absences to handle grievances turn on whether an employee does so on a part-time or full-time basis. The agreement of employer and union to take advantage of the efficiencies in granting one employee a leave of absence to handle grievance matters for eight hours a day should not be treated differently than a decision to have four employees each devote two hours to grievance handling each day. Pet. App. 10a. In either case, the payments are "by reason of" the recipient's service as an employee.

C. The History And Purpose Of Section 302(c)(1) Support The Court Of Appeals' Ruling

When Congress enacted the LMRA in 1947, it was well aware that "[e]mployers generally * * * allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant." H.R. Rep. No. 245, 80th Cong., 1st Sess. 28-29 (1947). At that time, "approximately 40% of all industrial collective bargaining agreements" contained some type of no-docking provision. *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050 (2d Cir. 1986) (citing *Basic Patterns in Collective Bargaining Contracts* 15:127 (BNA ed. 1948)). The legislative history does not indicate that Congress intended that Section 302 outlaw them. See generally Resp. Br. 27-42.

Section 302 was enacted primarily to regulate welfare funds and to preclude corrupt activities such as bribery and extortion. See *United States v. Ryan*, 350 U.S. 299, 304-305 (1956); *Arroyo*, 359 U.S. at 425-426 & nn.6-8; 93 Cong. Rec. 4677-4680 (1947); *id.* at 4678 (statement of Sen. Ball). The provision was introduced as an amendment on the Senate floor and, during that debate, there was only one mention of Section 302(c)(1), without any analysis or discussion. *Id.* at 4678. After adoption by the Senate, *id.* at 4745-4754, the matter was sent to a conference committee which recommended, *inter alia*, that Section 302 be included in the House legislation without changes to the relevant provisions as adopted by the Senate. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67 (1947). The conference report's discussion of Section 302 did not focus on subsection (c)(1), and there appears to be no mention of no-docking provisions being covered by Section 302.

Thus, as the Second Circuit concluded after an exhaustive examination of the legislative history, "the more

reasonable inference from Congress's failure to mention no-docking provisions in connection with § 302 is that Congress did not intend § 302(a) to outlaw such provisions." *BASF Wyandotte*, 791 F.2d at 1051; see also *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.5 (5th Cir. 1986).¹⁵ In the absence of any clear intent of Congress to exclude payments such as those at issue here from the Section 302(c)(1) exception, the Court should decline to interpret the statute in such a manner.

D. The Policy Of The LMRA Would Be Furthered By Application Of Section 302 To Permit The Payments At Issue Here

One of the LMRA's central purposes is "to provide orderly and peaceful procedures" for preventing either labor or management from interfering with the rights of the other. 29 U.S.C. 141(b); see also 29 U.S.C. 151 (policy of "encouraging practices fundamental to the friendly adjustment of industrial disputes"). A major factor in achieving industrial peace is a collectively bargained procedure for resolving grievances. *United Steelworkers v.*

¹⁵ Moreover, as the Second Circuit found, there is "fairly plain indication in Congress's treatment of other sections" of the House bill "that Congress considered no-docking provisions to be legitimate practices to be encouraged" and "that both branches of Congress" envisioned an increase in no-docking provisions. *BASF Wyandotte*, 791 F.2d at 1051, 1053; *id.* at 1051-1053 (discussing House bill that would have permitted employers to treat independent unions like national unions—including, under now-Section 8(a)(2), "allow[ing] shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant"—and House Conference Report that explained that Senate version "adequately dealt with" those matters) (quoting H.R. Conf. Rep. No. 510, *supra*, at 40). See also *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at 855-856 & n.5 (Fifth Circuit adopting same analysis as Second Circuit). Subsequent amendments to Section 302 are "consistent with the view that Congress did not intend that section to be read as prohibiting no-docking provisions." *BASF Wyandotte*, 791 F.2d at 1053 (citing legislative materials).

Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (in labor relations, "arbitration is the substitute for industrial strife"). Prohibiting collectively bargained payments to employees or former employees for their time spent participating in the grievance process could seriously undermine the effectiveness of that process. Such payments help ensure that grievances are brought to the employer's attention and efficiently resolved with the participation of the employee and the union representative, while minimizing the disruption to the workplace.

Criminalizing the payments at issue here could lead to invalidation of numerous existing collectively bargained arrangements.¹⁶ The Department of Labor has found some type of "no-docking" provision in a substantial percentage of collective bargaining agreements. See *Major Collective Bargaining Agreements*, *supra*, at 1, 6 (examination of nearly all private agreements covering 1,000 workers or more revealed that 45% granted employee union representatives pay for some types of grievance work and that such provisions applied to more than 80% of agreements involving certain industries and unions); see also *id.* at 10; *Collective Bargaining Clauses*, *supra*, at 1-2. The Department of Labor has also long recognized the importance of such agreements in its enforcement of the LMRDA and the FLSA. See pp. 16-17, 24, *supra*. The Department of Justice has not criminally prosecuted cases involving continuation of pay or benefits during grievance work, absent a corrupt execution of the

¹⁶ The record reflects the existence over the past several decades of collectively bargained agreements to pay full-time committeemen by major corporations, *e.g.*, by Ford (1941-42, 1993-96); by General Motors (1941, 1993-96); by Chrysler (1943-45, 1993-96); by John Deere (1971, 1995-97); by International Harvester (now Navistar) (1971); and by J.I. Case (1977-83, 1995-98). J.A. 57, 58, 63-64. Under petitioner's approach, all of those corporations were engaged in practices that are criminal violations of Section 302(a).

contract, or an arrangement that was a sham. Cf. *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994) ("company officials ignore[d] the * * * collective bargaining agreement with a union and secretly grant[ed] retroactive leaves of absence, and thus pension benefits, [solely] to a small number of the union's officials (and those officials ignore[d] union policy and accept[ed] the benefits)"), cert. denied, 514 U.S. 1003, opinion amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995); *United States v. Kaye*, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977). As noted above, the NLRB and lower courts have consistently approved no-docking arrangements. Such longstanding governmental interpretation and practice, known to Congress and not altered despite various amendments to Section 302, should be accorded some weight in considering the validity of the practice at issue. See, *e.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915); see also *United States v. Enmons*, 410 U.S. 396, 410 (1973) ("It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting [a statute], its action would have so long passed unobserved.").

Finally, petitioner's contention that approval of the payments at issue in this case would pose a serious risk to healthy labor-management relations is belied by experience in other labor-management circumstances. In 1978, when Congress passed the Civil Service Reform Act covering federal-sector employment, it authorized the type of payments alleged to be unlawful here. Section 701(d) of that Act provides, with exceptions not relevant here, that:

- (1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter [which includes the representation of employees in grievance procedures], any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. 7131(d). Accordingly, in the public sector the parties would be permitted to agree to treat as official time the full-time representation of employees by full-time union representatives, if "reasonable, necessary, and in the public interest." See *American Fed. of Gov't Employees v. FLRA*, 798 F.2d 1525 (D.C. Cir. 1986); see also *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 n.17 (1983) (noting that federal employee unions "may presumably negotiate" for travel and per diem expenses for union negotiators "as they do in the private sector"). Pay arrangements are apparently commonplace at the state level as well. See *Major Collective Bargaining Agreements*, *supra*, at 44-45. There is no reason for deeming the same type of payments to be unlawful in the private sector.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1997

APPENDIX

1. Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. 186, as amended, provides:

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with

intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or

personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational

activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs:

Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services

by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor

shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

2. Section 8 of the National Labor Relations Act, 29 U.S.C. 158, as amended, provides in relevant part:

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * *

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Supreme Court, U. S.

FILED

NOV 13 1997

No. 96-1925

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

CATERPILLAR INC.,

v.

Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA and its affiliated LOCAL UNION 786,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF THE
COUNCIL ON LABOR LAW EQUALITY
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 302(c)(1) of the LMRA exempts employer payments of wages and benefits to full-time union officials from the otherwise criminal proscriptions of Section 302(a) because those payments are negotiated during collective bargaining and are "by reason of" the union officials' past service with the employer?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EM- PLOYEE TO PAY FULL-TIME UNION OFFI- CIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING	11
II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c) (1) EX- CEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SEC- TION 302(a)	14
III. ENFORCING THE PLAIN WORDING OF SECTION 302(a) TO PROHIBIT EMPLOYER PAYMENTS TO FULL-TIME UNION OFFI- CIALS WHO PERFORM NO WORK FOR THE EMPLOYER WILL NOT CREATE DISLOCA- TION IN LABOR-MANAGEMENT RELA- TIONS SINCE, UNLIKE THE TYPICAL, MORE LIMITED "NO-DOCKING" ARRANGE- MENTS AUTHORIZED BY SECTION 8(a) (2) FOR CURRENT EMPLOYEES, SUCH PAY- MENTS ARE NOT COMMON IN INDUSTRY..	18

TABLE OF CONTENTS—Continued

	Page
IV. EXPANDING THE NARROW INTERPRETATION OF THE SECTION 302(c)(1) EXCEPTION TO ENCOURAGE EMPLOYER PAYMENTS TO FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER <i>WILL</i> CREATE DISLOCATION IN LABOR-MANAGEMENT RELATIONS IN WAYS INIMICAL TO COLLECTIVE BARGAINING AND SOUND NATIONAL LABOR POLICY, AND MAY CAUSE SUBSTANTIAL UNCERTAINTIES AND WORKPLACE DISRUPTIONS UNDER OTHER EMPLOYMENT LAWS	20
CONCLUSION	25

TABLE OF AUTHORITIES

Federal Cases	Page
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959)	5, 7, 12
<i>BASF Wyandotte Corp. v. Local 227</i> , 791 F.2d 1046 (2d Cir. 1986)	8, 15, 16
<i>Caterpillar Inc. v. United Auto. Workers of Am.</i> , 107 F.3d 1052 (3d Cir. 1997)	<i>passim</i>
<i>Communications Workers of Am. v. Beck</i> , 487 U.S. 735 (1988)	21
<i>Communications Workers of Am. v. Bell Atl. Network 'Servs., Inc.</i> 670 F. Supp. 416 (D.D.C. 1987)	8
<i>Employees' Independent Union v. Wyman Gordon Co.</i> , 314 F. Supp. 458 (N.D. Ill. 1970)	8
<i>Herron v. International Union, UAW</i> , 73 F.3d 1056 (10th Cir. 1996), <i>aff'g</i> & adopting district court's decision, 858 F. Supp. 1529 (D. Kan. 1994)	8
<i>International Bhd. of Elec. Workers Local 2514 v. National Fuel Distribution Corp.</i> , 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993)	15
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986)	8
<i>NLRB v. Town & Country Electric, Inc.</i> , — U.S. —, 116 S. Ct. 450 (1995)	23
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947)	6, 25
<i>Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.</i> , 634 F.2d 258 (6th Cir. 1981)	9, 16
<i>Toth v. USX Corp.</i> , 883 F.2d 1297 (7th Cir.), <i>cert. denied</i> , 493 U.S. 994 (1989)	<i>passim</i>
<i>Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union</i> , 785 F.2d 101 (3d Cir. 1986)	4, 9, 10
<i>United States v. Pecora</i> , 485 F.2d 1289 (3d Cir. 1973)	22
<i>United States v. Phillips</i> , 19 F.3d 1565 (11th Cir. 1994), <i>cert. denied</i> , 115 S. Ct. 1312 (1995)	<i>passim</i>
<i>United States v. Ryan</i> , 350 U.S. 299 (1956)	5, 22
<i>Walters v. Metropolitan Educ. Enters., Inc.</i> , — U.S. —, 117 S. Ct. 6660, 136 L. Ed. 2d 644 (1997)	23

TABLE OF AUTHORITIES—Continued

<i>Statutes and Legislative Materials</i>	Page
93 Cong. Rec. 4704 (1947)	12
93 Cong. Rec. 4805 (1947)	6, 12
93 Cong. Rec. 4877 (1947)	
II NLRB Legislative History of the Labor- Management Relations Act 1305 (1948)	6, 12
H.R. Rep. No. 741, 86th Cong., 1st Sess., <i>reprinted</i> <i>in</i> 1959 U.S.C.C.A.N. 2424, 2469	13
S. Rep. No. 187, 86th Cong., 1st Sess., <i>reprinted in</i> 1959 U.S.C.C.A.N. 2318, 2329	5, 13
S. 1126, 80th Cong., 1st Sess. (1947)	11
Section 302(a) of the Labor-Management Relations Act, 29 U.S.C. 186(a)	<i>passim</i>
Section 302(c) (1) of the Labor-Management Rela- tions Act, 29 U.S.C. § 186(c) (1)	<i>passim</i>
Section 302(d) of the Labor-Management Relations Act, 29 U.S.C. § 186(d)	2
Section 8(a) (2) of the National Labor Relations Act, 29 U.S.C. § 158(a) (2)	8, 25
Section 8(a) (5) of the National Labor Relations Act, 29 U.S.C. § 158(e) (5)	4
Section 8(b) (2) of the National Labor Relations Act, 29 U.S.C. § 158(b) (2)	4
Section 8(b) (6) of the National Labor Relations Act, 29 U.S.C. § 158(b) (6)	25
Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth	9
The Americans With Disabilities Act, 42 U.S.C. § 1201 <i>et seq.</i>	24
The Fair Labor Stanadrds Act, 29 U.S.C. § 201 <i>et seq.</i>	24
The Family and Medical Leave Act, 29 U.S.C. §§ 2601-54	24
The Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151-87	<i>passim</i>
The Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531	13, 21
The Occupational Safety and Health Act, 29 U.S.C. § 553 <i>et seq.</i>	24

TABLE OF AUTHORITIES—Continued

	Page
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e <i>et seq.</i>	23
<i>Miscellaneous</i>	
U.S. Department of Labor, "Major Collective Bar- gaining Agreements: Employer Pay and Leave for Union Business," Bulletin 1425-19 (1980)	18, 19
"Teamwork for Employees and Managers (TEAM) Act of 1997," § 295 (105th Cong., 1st Sess.)	25
EEOC Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees are Employees (Apr. 1990), <i>reprinted in</i> 3 EEOC Compl. Man. (BNA) at N:3311	24

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1925

CATERPILLAR INC.,
v. *Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF THE
COUNCIL ON LABOR LAW EQUALITY
IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

COLLE is a national association of employers formed in 1981 to provide legal support to the business community through the filing of *amicus curiae* briefs with the courts and the National Labor Relations Board on those issues arising under the federal labor statutes which affect a broad cross-section of industry.¹ COLLE was formed to

¹ This brief is being submitted by the Council on Labor Law Equality ("COLLE"), as *amicus curiae* in support of petitioner. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae*

create a specialized and continuing business community resource to maintain a balanced approach in the formulation and interpretation of national labor policy. Over the years, COLLE has participated as an *amicus curiae* in cases of major significance before the National Labor Relations Board and the federal courts, including the Supreme Court. See, e.g., *International Bhd. of Elec. Workers v. Colorado-Ute Elec. Ass'n, Inc.*, No. 91-1284 (1992); *Lechmere, Inc. v. NLRB*, No. 90-970 (1992); *Building & Constr. Trades Council v. Altemose Constr. Co.*, No. 85-82 (1986); *NLRB v. Transportation Management Corp.*, No. 82-168 (1983).

This case involves employer payments to full-time union representatives pursuant to Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186. The resolution of the issues raised in this case is significant for COLLE, its member, Caterpillar Inc., as well as its other member companies, because the Third Circuit *en banc* fashioned an overly permissive interpretation of Section 302 that permits employer payments to full-time union officials "by reason of" the union officials' past service with the employer and because those payments were negotiated in collective bargaining. *Caterpillar, Inc. v. United Auto Workers of Am.*, 107 F.3d 1052 (3d Cir. 1997). None of the other Courts of Appeals that has interpreted the Section 302(c)(1) exemption—including the Second, Fifth, Sixth, Seventh, and Eleventh Circuits—has expanded the exemption to this extent.

An equally important concern is that under Section 302(d) of the LMRA, 29 U.S.C. § 186(d), violation of Section 302(a) subjects employers to criminal penalties. Cf., *United States v. Phillips*, 19 F.3d 1565 (11th Cir.

COLLE certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than COLLE and their counsel made any monetary contribution to the preparation or submission of this brief.

1994) (imposing criminal penalties against union officials for violating Section 302(a)), *cert. denied*, 115 S. Ct. 1312 (1995); *Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) ("The proper remedy for the situation if bribery was indeed involved is prosecution of the company and union officials at fault, not judicial approval of the bribery scheme"), *cert. denied*, 493 U.S. 994 (1989). In light of the vastly different interpretations that the courts have given to the Section 302(c)(1) exception, employers have no uniform federal guidance regarding their potential criminal exposure.

It is COLLE's position that an employer's payment of wages to full-time union officials who perform no work for the employer is contrary to the plain language of Section 302(a). Because Caterpillar's payments were not generally applicable to former employees "as compensation for, or by reason of" their past service with the employer, these payments could not have been saved from illegality under the Section 302(c)(1) exemption. In addition, regardless of a union's strength during collective bargaining, activity that is unlawful cannot be legitimized simply because an employer "agreed" to it in negotiations.

STATEMENT OF THE CASE

Petitioner Caterpillar Inc. (Caterpillar) and Local 786, United Automobile Aerospace and Agricultural Implement Workers of America (UAW or Respondent) have been parties to collective bargaining agreements since 1954. (Pet. App. 4a). Until 1973, the agreement contained a "no-docking" provision which permitted employees who served as union stewards and committeemen to devote part of their work week to union business without losing pay or benefits. In 1973, the parties revised the collective bargaining agreement to allow union committeemen working full-time for the union to be maintained on the company's payroll, to be paid wages and benefits by Caterpillar. These full-time union officials

(Committeemen) performed no work for Caterpillar, conducted all business from the union hall, and were not under the direct control of Caterpillar except with regard to time reporting. (Pet. App. 4a).

In 1991, after the collective bargaining agreement expired, a nationwide labor dispute ensued between the parties. A year later, Caterpillar informed the Union that it would cease paying the Committeemen and questioned the legality of such payments to full-time union officials who performed no work for Caterpillar. Caterpillar maintained that the payments violated Section 302 of the Labor-Management Relations Act of 1947 (LMRA). Pet. App. 4a. As a result, the UAW filed an unfair labor practice charge with the National Labor Relations Board (NLRB) alleging that Caterpillar had refused to bargain in good faith, as required by Section 8(a)(5) of the National Labor Relations Act (NLRA), before rescinding the payments. A month later, Caterpillar filed this action in the U.S. District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the payments violated Section 302. Pet. App. 4a.

The district court stayed the proceedings pending resolution of the union's unfair labor practice charges. Although the NLRB's administrative law judge (ALJ) found that the payments violated Sections 8(a)(5) and 8(b)(2) of the NLRA and questioned their validity under Section 302, the ALJ recommended dismissal of the union's charge. Thereafter, the district court granted Caterpillar's request for declaratory relief and ruled that the payments in question violated Section 302 of the LMRA and were not within its Section 302(c)(1) exception. Pet. App. 63a. The UAW appealed the ruling to the Third Circuit which, in a 9-3 *en banc* opinion, overruled its own precedent (*Trailways Lines, Inc. v. Trailways Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986)) and reversed the district court's ruling. Pet. App. 1a-12a.

SUMMARY OF ARGUMENT

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (Section 302) makes it unlawful for an employer to pay or agree to pay money or any other thing of value to union officials who represent the employer's workers. A limited exception to Section 302 exists for employer payments to a union representative who is a current or former employee "as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). There is no exception for such payments merely because they are included in a collective bargaining agreement or negotiated at arms-length and in good faith. Section 302 is written *in malum prohibitum* and requires no "corrupt purpose" or "evil intent." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

Section 302 is part of a comprehensive reform of federal labor law enacted in 1947 to prohibit featherbedding, extortion, bribery, payoffs and other corrupting practices, such as collusion, which are inimical to collective bargaining, or which might create conflicts of interest that impair the ability of employee representatives to exercise their fiduciary responsibilities solely in the interests of those whom they represent. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959).

In 1959, Congress broadened the proscriptions of Section 302 to make it clear that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187 (Conference Rept.), 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31.

There is no dispute that on the face of Section 302(a), the petitioner Caterpillar's wage and benefit payments

to full-time union representatives who perform no work for the employer are unlawful. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d 1052, 1054 (3d Cir. 1997). The challenged payments clearly create the type of conflict-of-interest which Congress intended to proscribe when it enacted Section 302. Cf. *Caterpillar v. United Auto. Workers of Am.*, 107 F.3d at 1057. The payments are not saved from illegality because they were negotiated at arms-length and not part of secret, back-room deals between the parties. Congress understood that even negotiated payments from employers might "degenerate into bribes". See 93 Cong. Rec. 4805 (1947), reprinted in II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 (1948).

The Third Circuit's new overly-expansive interpretation of the Section 302(c)(1) exception is far more permissive than any other circuit and, in effect, swallows the proscriptions in Section 302(a). The Third Circuit creates a "full-time union official" exception, which merely requires that the union official have once worked for the employer. As a result, what has been a rare practice of employer payments to full-time union officials, now may open the door to the types of conflict-of-interest abuses that Congress proscribed in 1947 and 1959.

Reversing the Third Circuit's decision and proscribing the challenged payments would not disturb typical "no-docking" arrangements in industry nor lead to massive dislocations in labor-management relations; to the contrary, allowing the Third Circuit's "full-time union official" exception to stand would create uncertainties and future litigation under other workplace laws arising out of the definitions of "employee."

It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947).

ARGUMENT

Fifty years ago, Congress passed the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151-87, heralding in a new era of labor-management relations. In addition to setting forth the rights of unions, employers, and employees, the law also delineated the boundaries of lawful and unlawful payment arrangements between employers and unions in Section 302 of the Act. 29 U.S.C. § 186.

Section 302 arose out of legislative concern that employer payments for pension and welfare benefits often were diverted to the benefit and personal use of union leaders or as resources to be used during a strike. Congress enacted Section 302 as part of a comprehensive reform of federal labor law and policy, to deal specifically with practices inimical to the integrity of collective bargaining, and to prevent practices which, if unchecked, could lead to bribery and extortion by union officials or which, by collusion, might impair the impartiality of employee representation. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). Congress therefore made it unlawful, except in very narrow circumstances, for employers to pay money or any other thing of value to union officials:

It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce; . . .

29 U.S.C. § 186. Based simply on a plain reading of Section 302(a), all employer payments to union officials are unlawful.

Section 302(c), however, contains several exceptions to the prohibitions found under Section 302(a). The exception at issue in this case is found in Section 302(c)(1). In relevant part, it provides that it is not unlawful for an employer to pay money or other thing of value to any representative of his employees who is a present or former employee "as compensation for, or by reason of, his service as an employee of such employer[.]" 29 U.S.C. § 186(c)(1). Section 302(c)(1) does not contain an exception that permits employers to use the collective bargaining process to make payments that would not otherwise be permitted under Section 302.

For decades, unions have tested the boundaries of the criminal statute by seeking to negotiate various payment arrangements, which employers have challenged in the courts. In general, the courts have upheld payment arrangements where employees take a few hours out of the workday or workweek to perform work for the union. These agreements are known as "no-docking" arrangements and they are not being challenged here.²

² As the Third Circuit observed, "no-docking arrangements have been consistently upheld by the courts as not in violation of § 302 because the employer's payment is to current employees as compensation for, or by reason of, their service to the employer." See *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); *Herron v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970). Such practices are also permitted under Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) ("Provided, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay") and Section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth ("Provided, That nothing in this chapter

The courts have rejected arrangements, however, where:

- payments are made to individuals who are not employed by the employer, *see, e.g., Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (because industry steward could not be characterized as an employee of Bechtel, any contributions by Bechtel to the industry steward fund would violate the terms of Section 302(a));
- payments were not compensation for or by reason of the employees' service to the employer, *see, e.g., Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986) (ruling unlawful union's attempt to have employer make contributions to pension trust funds on behalf of employees who took leaves of absence to accept full-time positions with the union or its parent international because contributions were not made for past service to the employer);
- the union sought retroactive pension service credit for former employees on leave working full time for the unions; *see, e.g., Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) (Section 302(c)(1) does not exempt an employer's leave of absence policy awarding retroactive pension service credit to former employees who were on leave working full-time as union officials because payments are not made for past services rendered by the former employee while an employee), *cert. denied*, 493 U.S. 994 (1989); and,
- the employer agreed to extend its leave of absence policy to enable union leaders to obtain company

shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time. . . .").

provided pensions even though they had been working full time for years as a union official, *see, e.g., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (affirming imposition of criminal penalties against union officials who obtained in collective bargaining retroactive extensions of their leave of absence from the employer so as to qualify them for employer-provided pensions, even though they had not worked for the employer for many years), *cert. denied*, 115 S. Ct. 1312 (1995).

In each of these cases, the union's arrangement fell outside the Section 302(c)(1) exemption.

In the present litigation, the UAW, during collective bargaining, sought to have Caterpillar pay the wages and fringe benefits of full-time union officials who performed no services at all for Caterpillar. The union officials were on leave of absence and would be paid at the same rate as when they last worked on the factory floor. *Caterpillar*, 107 F.3d at 1053. They conducted business from the union hall, performed no duties directly for Caterpillar, and were not under the control of Caterpillar except for time reporting services. *Id.* The Union contended that because the employees on leave for union business worked for Caterpillar in the past, the payments satisfied the exception under Section 302(c)(1) for payments made "by reason of" the employees' past service to Caterpillar. This exception for past service has come to be known as the "by reason of" exception to Section 302. The Third Circuit overruled its prior precedent in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986), and became the first court to hold that Section 302(a) was not violated by an agreement that placed full-time union officials in a paid leave of absence status. In addition, the Third Circuit found significant the fact that Caterpillar and the

union agreed to this arrangement as part of the collective bargaining process.

COLLE supports the petitioner Caterpillar in this case for several reasons. First, its employer members suffer potential exposure to criminal penalties for violations of Section 302(a). Second, the collective bargaining process will be facilitated by Supreme Court guidance clearly defining the scope of the Section 302(c)(1) exemption. Third, the lack of uniformity among the circuits regarding what types of payments from employers to union officials are lawful under Section 302 of the LMRA and what the proper test should be for interpreting the Section 302(c)(1) exemption cause significant uncertainties for employers with multi-state collective bargaining agreements. The same collective bargaining provision may be lawful in one jurisdiction and unlawful in another.

I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EMPLOYER TO PAY FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING

Section 302 is a conflict-of-interest statute that was designed to eliminate practices that have the potential for corrupting the labor movement. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d at 1057 (majority opinion) and 1059 (dissent); *see United States v. Phillips*, 19 F.3d at 1574. As reflected in the legislative history, Section 302 was introduced on the floor of the Senate as a proposed amendment to S. 1126, 80th Cong., 1st Sess. (1947), a bill to amend the NLRA as originally enacted in 1935. The proposed amendment (i.e., Section 302) read, in pertinent part, as follows:

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee of such employer, as compensation for, or by reason of, his services as an employee of such employer;

93 Cong. Rec. 4704 (1947). The remainder of subsection (c) listed additional not currently relevant categories of exemptions. In introducing this proposed amendment, Senator Ball, one of its authors, stated that one of the purposes of Section 302 was to ensure that payments by employers to the unions would not "degenerate into bribes." 93 Cong. Rec. 4805 (1947). Other senators echoed this understanding. *See, e.g., id.* (statement of Senator Byrd); *id.* at 4877 (statement of Senator Taft). *See also Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (remarking that "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . possible abuse by union officers of the power which they might achieve if welfare funds were left to this sole control" were the congressional concerns that led to the enactment of Section 302) (footnotes omitted).

It is quite clear from the legislative history that Congress understood that even negotiated payments from employers might "degenerate into bribes." *See* 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 *States v. Phillips*, 19 F.3d 1595 (11th Cir. 1994) (upholding criminal convictions of union officials who negotiated unlawful employer payments in the form of retroactive pension credit), *cert. denied*, 115 S. Ct. 1312 (1995);

Caterpillar, 107 F.3d at 1060 ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management") (dissent).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531, which amended several sections of the LMRA, including Section 302. Congress intended to broaden the categories of persons affiliated with unions to whom the proscriptions of Section 302 would apply, *see* H.R. Rep. No. 741, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2424, 2469, and to make it applicable "to all forms of extortion and bribery in labor-management relations some of which may slip through the present law." S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2329. Indeed, the Conference Report noted that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organization. "The Government which rests in labor unions the power to act as exclusive bargaining representative must make sure that the power is used for the benefit of workers and not for personal profit." *Id.* at 2331).

In sum, there is nothing in the legislative history to suggest that Congress believed that the process of collective bargaining could "save" otherwise potentially unlawful conduct under Section 302. To the contrary, Congress intended to prohibit *any* payment, including payments negotiated by the employees' exclusive bargaining representative, unless it fell within the Section 302(c) exception. The payments that the UAW negotiated in collective bargaining with Caterpillar—payments to full-time

union officials who are not working for Caterpillar—violate Section 302(a) and contravene the expressed intent of the legislation's drafters. Caterpillar's payments to full-time union officials would place such persons in a position in which their self-interest may "conflict with complete loyalty to those whom they serve," and cause responsible trade union officials to "have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." Thus, unless section 302(c)(1) applies, the sought-after payments violate Section 302(a).

II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c)(1) EXCEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SECTION 302(a)

The Third Circuit did not find that the payments were exempted under a plain reading of Section 302(c)(1) or its legislative history. Rather, the Third Circuit interpreted the "by reason of" exception in Section 302(c)(1) to apply to the payments solely because they were negotiated in collective bargaining:

We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself.

Caterpillar, 107 F.3d at 1056. By extending the exception to payments made to grievance representatives who take "years, even decades, of paid union leave," and perform *no* work for the employer, simply because those payments are bargained for, the Third Circuit has so far broadened the scope of the exception that it has swallowed the prohibitions in Section 302(a).

None of the other courts of appeals to consider the scope of Section 302(c)(1) has applied the exception to payments not directly connected with the individual's past

service for the employer. Neither have they rationalized such payments because the payments were "negotiated" in collective bargaining. *See, e.g., Toth*, 883 F.2d at 1305 ("at some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302(a)—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment, or if the term vested so much discretion in the employer that the potential for undue influence created a clear section 302(a) violation"); *IBEW Local 2514 v. National Fuel Distribution Corp.*, 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993).

Rather, the "by reason of" exception of Section 302(c)(1) has consistently been interpreted to encompass payments for past service that are not properly classified as "compensation." *Caterpillar*, 107 F.3d at 1058 (Mansmann, J., dissenting) (collecting cases). The federal courts have applied the "by reason of" exception to pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay and pension benefits"), *cert. denied*, 115 S. Ct. 1312 (1995); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits and the like"); *see also Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994 (1989).

Without the "by reason of" exception for past service, these payments would be illegal if paid to any employee

or former employee who worked full-time for a union because they could not be considered "compensation" from the employer. This exception in its traditional application serves a salutary purpose. Labor-management relations in the workplace would be imperiled if employees who were given time off with pay to process grievances would lose the right to these benefits simply because they worked part-time, or took short periods of leave under the employer's policy to serve as a union official. As the dissent in *Caterpillar* recognized, "[s]ection 302 (c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service to the union; the exception allows union representatives to receive payments *in spite of* their current service for the union." *Caterpillar*, 107 F.3d at 1059 (Mansmann, J., dissenting).

Until the Third Circuit's decision, the linchpin between lawful conduct and employer payments has always been that the employee must receive the compensation or other payments because of his or her service for the employer. *Caterpillar*, 107 F.3d at 1059, citing *Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"), *id.* (under plain meaning of exception, "payment given to *former* employee must be for services he rendered *while he was an employee*"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work") and at 1050 ("The exception permits only compensation for or by reason of 'service as an employee'; a union official who, though on the employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception"); *Reinforcing Iron Workers*

Local Union No. 426 v. Bechtel Power Corp., 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for the union, not employer, are unlawful).

After the Third Circuit's decision, there is no legal distinction between the arrangement in *Caterpillar* and an arrangement in which an employer agrees to pay the salaries and fringe benefits for full-time union officers or agents who have not worked actively for five, ten, or fifteen years. For example, the Third Circuit's interpretation may give unions—on threat of strike or other economic pressure, or as a negotiated trade-off for other terms and conditions in the collective bargaining agreement—the power to demand employer payments to full-time union officials so long as those officials worked for the employer at some point in time. According to the Third Circuit, as long as the payment is "by reason of" the official's past service for the employer and the employees agreed to it in collective bargaining, it is lawful under Section 302(a). That interpretation is not supported by the legislative history, the plain reading of the statute, or any of the cases previously decided in the other circuits. Further, that interpretation invites the abuse of the collective bargaining process which Congress sought to address through Section 302 and which would be inimical to fundamental principles of labor law and policy.

In effect, the Third Circuit's interpretation legitimizes virtually any type of payment from the employer to a union official so long as the payment is negotiated and ratified in a collective bargaining agreement. That interpretation would so eviscerate Section 302 as to render it a nullity, once again leaving the collective bargaining process ripe for abuse.

III. ENFORCING THE PLAIN WORDING OF SECTION 302(a) TO PROHIBIT EMPLOYER PAYMENTS TO FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER WILL NOT CREATE DISLOCATION IN LABOR-MANAGEMENT RELATIONS SINCE, UNLIKE THE TYPICAL, MORE LIMITED "NO-DOCKING" ARRANGEMENTS AUTHORIZED BY SECTION 8(a)(2) FOR CURRENT EMPLOYEES, SUCH PAYMENTS ARE NOT COMMON IN INDUSTRY

By continuing to blur the distinction between typical "no-docking" arrangements and the types of payments at issue here, respondent UAW persists in the highly misleading suggestion that the challenged payments are commonplace in collective bargaining agreements throughout industry and, therefore, proscribing such payments under Section 302 would lead to massive upheaval in labor relations. See Resp. Br. Opp. Cert. at 2-4. In fact, authorities relied upon by respondent UAW demonstrate to the contrary that employer payments to full-time union officials are *rare* in the private sector. See U.S. Department of Labor, "Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business," Bulletin 1425-19 (1980) ("U.S. Dept. of Labor Bulletin"). The types of payments to union representatives which are challenged here are unlike typical "no-docking" arrangements where current employees are permitted paid time away from their normal work assignments to attend to union business on an intermittent "as needed" basis.

The U.S. Department of Labor has found that private sector employees who take leaves of absence to work full time as union representatives, and no longer perform for the employer, are usually *not* paid by their employer.

Although employer-paid leave of absence for union business is fairly common in public sector agreements, only a relative handful of agreements in private industry allow such paid leave.

U.S. Dept. of Labor Bulletin, p. 5; *Accord*: U.S. Dept. of Labor Bulletin, p. iii ("usually *unpaid* leave of absence granted"); p. 1 ("leave of absence [is] usually *unpaid*"); p. 2 ("leave of absence generally *unpaid*"); p. 20 ("union representative must obtain a formal, and generally *unpaid* leave of absence Unions usually pay these officials"); p. 25 ("During union leave of absence, the employer generally has no responsibility to continue the employee's wages"); p. 29 ("Company pay for employees on leave to hold *full-time* union positions [is] *rare*.") (emphasis added). The U.S. Department of Labor's research indicates that in "less than one percent" of the agreements that permit employees to take leaves of absence to accept a full-time union position is there a requirement to retain the union official on the payroll. U.S. Dept. of Labor Bulletin, p. 29.

Since "no-docking" arrangements are not being challenged here, it begs the question that "virtually every labor agreement to which UAW is a party" includes grievance handling procedures, that "no-docking" provisions were "first included in the Caterpillar-UAW agreement in 1942," and that as of 1980 "the number of industrial agreements containing such provisions had grown to nearly two-thirds" (citing 1980 U.S. Dept. of Labor Bulletin, p. 32). Resp. Br. Opp. Cert at 2. Those agreements referred to by respondent UAW are not at risk. In fact, using the U.S. Department of Labor's statistics, only a small percentage of private sector industrial agreements—a "handful"—would be affected by a proscription on the type of "full-time, paid union official" arrangement at issue here. This would hardly lead to massive dislocation in labor relations suggested by the grossly exaggerated claims of respondent UAW and *amicus* AFL-CIO before the Third Circuit. See AFL-CIO Br. (3d Cir.), p. 4 ("forbidding this common practice will have a profoundly unsettling effect on the typical grievance procedure."); p. 22 ("virtually every collectively bargained grievance

procedure will have to be immediately and substantially revised.")

The dissents below debunk such false claims by pointing to the practical and legal differences between the two types of "no-docking" arrangements. *Caterpillar*, 107 F.3d at 1057. It would not cause discord in labor-management relations to proscribe employer payments to full-time union officials who perform no work for the employer, while privileging payments to current employees who take intermittent leaves of absence to conduct union business. The distinction would be consonant with the policies underlying Section 302, consistent with industry practice (including the modern trend to involve employees, both represented and unrepresented, in workplace dispute resolution), clearly understood by the parties, and easily enforced by the government and the courts.

IV. EXPANDING THE NARROW INTERPRETATION OF THE SECTION 302(c)(1) EXCEPTION TO ENCOURAGE EMPLOYER PAYMENTS TO FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER WILL CREATE DISLOCATION IN LABOR-MANAGEMENT RELATIONS IN WAYS INIMICAL TO COLLECTIVE BARGAINING AND SOUND NATIONAL LABOR POLICY, AND MAY CAUSE SUBSTANTIAL UNCERTAINTIES AND WORKPLACE DISRUPTIONS UNDER OTHER EMPLOYMENT LAWS

COLLE is concerned that the Third Circuit's "full-time union official" exception to Section 302(a) will reopen the door to the types of corrupt practices, self-dealing, and conflicts of interest which Congress proscribed as inimical to collective bargaining. Under the Third Circuit's interpretation, Section 302(c)(1) now provides fertile ground for corruption by permitting union officials who perform no work for the employer to negotiate special wages and benefits applicable to themselves alone on the basis that they once worked for the employer.

The Third Circuit's decision bases its holding, in part, on the argument that "the payments [to union representatives] arose, not out of some 'back-door deal' with the union, but out of the collective bargaining agreement itself," *Caterpillar*, 107 F.3d at 1056, and "on which each employee has the opportunity to vote." *Id.* at 1057. Yet, ratification of the agreement by bargaining unit employees does not remove the taint from either the appearance or the fact of conflict of interest. Even in those unions which submit agreements to ratification, rank-and-file bargaining unit employees will not be privy to the subtleties of negotiations reflecting what may have been traded off against their interests in exchange for special wages and benefits for union officials. Thus, while such arrangements may not be "back-door deals," they certainly will not be in "plain view". The Third Circuit's decision below is oddly out-of-step at a time when this Court and others are demanding greater union accountability to their rank-and-file membership, *see, e.g., Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and when the evils of diverting union funds for personal election to union office are splashed in national headlines and debated in Congress.

In its *amicus curiae* brief before the Third Circuit, the U.S. Department of Labor expressed similar concerns that the arrangements at issue here could lead to the types of corrupt practices which are in the zone of proscribed activities under Section 302. At the very least, the Government's brief conceded, such employer payments would demand the Department's "special scrutiny" in enforcing Title II of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 *et seq.* For example, the Government's brief acknowledged that "[p]ayments to an individual who has not worked for the company in his regular job for an extended period of time, and who is unlikely ever to return to such work, also warrant special scrutiny." Gov. Br., p. 27. The Government's brief also conceded that "there may well be a violation of Section 302 . . . [if] the terms of compensation for former em-

ployment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment." Gov. Br., p. 26. See *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989).

As the Government's unworkable "special scrutiny" balancing test³ implicitly concedes, the corrupting influence of employer payments which are clearly proscribed by Section 302 is only different by degree from the potentially corrupting influence of such payments to full-time union representatives who perform no work for the employer. Yet, the Third Circuit's decision does not even go that far; it simply dismisses any concern for the potentially corrupting influence of such payments on the theory that bargained-for arrangements do not pose the same kind of harm as bribery, extortion and other corrupt practices conducted in secret.⁴ *Caterpillar*, 107 F.3d at 1057. As a result, by disregarding the Government's concerns, the Third Circuit's blanket endorsement of such practices will embolden labor and management to "negotiate" in exchange for other concessions all manner of special payments and benefits that apply *only* to union officials *e.g.*, an expanded leave of absence policy only for union officials, retroactive pension credit solely for union officials; special wages negotiated solely for union officials that are incommensurate with those negotiated for current employees and with the union representative's own former salary

³ As the dissent below observes, the complex balancing test advocated by the Government is more properly for legislative, not judicial consideration. *Caterpillar*, 107 F.3d at 1073 (dissent).

⁴ The Third Circuit turns a blind eye to the payments at issue because it believes that such payments are the result of arm-length bargaining and, therefore, not the type of "corrupt practices" Congress intended to proscribe. That ignores the fact that Section 302 is written in *malum prohibitum* which requires no "corrupt purpose" or "evil intent." *United States v. Ryan*, 350 U.S. 299, 305 (1956); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973). The prohibition is not altered by the parties' good intentions, salutary purposes, or the alleged beneficial effects on labor-management relations.

with the employer. As the dissent states, the Third Circuit "has embarked on a slippery slope that will legitimize any type of payment from the employer to the union so long as the payment is negotiated and included in the collective bargaining agreement." *Id.* at 1062.

Employers want to be shielded from the types of strong-arm "negotiating" tactics that may result from the Third Circuit's open invitation for unions to demand special payments to full-time union officials who perform no work for the employer. Similarly, unions should want to be shielded from an unscrupulous employer's seductive "negotiating" tactics, and from the impropriety, or appearance of impropriety, of accepting special payments for union officials. These dual concerns are shared by the U.S. Department of Labor, which has admitted that under such arrangements the union "may use its bargaining power or concede on some issue important to management to recure the desired union business provisions." U.S. Dept. of Labor Bulletin, p. 1. To the extent that such unchecked abuse occurs, or could occur, the integrity of the collective bargaining process would be compromised in ways Congress intended to proscribe.

Employer payment of a full-time union official's salary and benefits also raises other potentially disruptive issues as a result of the official's putative status as an "employee" under various employment laws. *Cf. NLRB v. Town & Country Electric, Inc.*, — U.S. —, 116 S.Ct. 450 (1995) (paid union organizers are "employees" under the NLRA where they perform current services for the employer under the employer's direction and control.) For example, who is the employer responsible for the union official's conduct toward employees under racial and sexual harassment guidelines of Title VII of the Civil Rights Act of 1964? Although the union officials here are maintained on Caterpillar's current payroll, the company has no direct control over the union official except for reporting time. Yet, under EEOC guidelines, employee status is determined, in part, by whether the em-

ployee is on the company's payroll. EEOC Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees are Employees (Apr. 1990), at 24, *reprinted in* 3 EEOC Compl. Man. (BNA), at N:3311; see *Walters v. Metropolitan Educ. Enters., Inc.*, — U.S. —, 117 S. Ct. 660, 136 L.Ed.2d 644 (1997).

Similarly, although Caterpillar has no control over its "former employees" serving as full-time union representatives, who is the responsible employer for workers' compensation claims if the union representative is injured "at work"? Is Caterpillar obligated to reasonably accommodate the disability of the former employee/full-time union official under the Americans With Disabilities Act? 42 U.S.C. § 12101 *et seq.* Where the company has no authority to direct the work hours of the former employee/full-time union official, who is responsible for overtime violations under the Fair Labor Standards Act? 29 U.S.C. § 201 *et seq.* What if the former employee/full-time union official refuses to wear a hard hat or comply with other safety standards while processing grievances and conferring with production employees in the plant, is the company subject to an OSHA citation and any assessed penalty? See Occupational Safety and Health Act, 29 U.S.C. § 553 *et seq.* Is the company responsible for granting FMLA leave requests of the former employee/full-time union official under Family and Medical Leave Act? 29 U.S.C. § 2601-54.

It is for such reasons that Congress, not the courts, is best suited to consider the impact of expanding the scope of an exemption under the LMRA in ways which are at odds with its plain terms and clear legislative history. Not only is the LMRA itself a carefully-crafted, interdependent balance of rights and obligations for labor and management, such that changing one section will have an effect on other sections, but its provisions also have consequences for other workplace laws. Congress, not the courts, is best suited to consider and harmonize the overlapping, cumulative effect of such changes. It is for Congress,

not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947); *Caterpillar*, 107 F.3d at 1058 (dissent).

If there is merit in respondent UAW's argument that the practice of employer payments to full-time union officials who perform no work for the employer is beneficial for labor-management relations, that position is best advocated and debated before Congress. Congress is best suited to harmonize that change, for example, with feather-bedding provisions [Section 8(b)(6)] and other sections of the National Labor Relations Act. Just as other groups currently advocate before Congress the adoption of certain legislative changes in the "company domination" section of the Act, 29 U.S.C. § 158(a)(2), in order to permit and promote broader involvement in employer-employee workplace committees, [see "Teamwork for Employees and Managers (TEAM) Act of 1997," S. 295. (105th Cong., 1st Sess.)], so, too, respondent UAW is certainly familiar with how to seek expansion of the Section 302(c)(1) exception and Section 8(a)(2) "no-docking" proviso in Congress, as well.

CONCLUSION

For the foregoing reasons, the Council on Labor Law Equality urges the Court to reverse the judgment of the United States Court of Appeals for the Third Circuit or to enter an appropriate modifying order.

Respectfully submitted,

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No. 96-1925

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IN THE
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OCTOBER TERM, 1997

CATERPILLAR INC.,

v.

Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF ON BEHALF OF AMERICAN
AUTOMOBILE MANUFACTURERS ASSOCIATION
AS AN AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. A DECISION THAT DEPARTS FROM THE GENERALLY ACCEPTED CONSTRUCTION OF SECTION 302(C) (1) WOULD UNFAIRLY PREJUDICE EMPLOYERS WHO HAVE RELIED ON THE LANGUAGE, LEGISLA- TIVE HISTORY AND APPLICABLE CASE LAW OF THIS SECTION	5
II. A DECISION THAT CAUSES A REVERSAL OF PRESENT PAY PRACTICES WOULD HAVE A SERIOUS DISRUPTIVE EFFECT ON BOTH MANUFACTURING OPERATIONS AND THE STRUCTURE OF COLLECTIVE BARGAINING RELATIONSHIPS IN THE U.S. AUTOMOBILE INDUSTRY	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
<i>BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union</i> , 791 F.2d 1046 (2d Cir. 1986)	7
<i>Communications Workers of America v. Bell Atlantic Network Services, Inc.</i> , 670 F. Supp. 416 (D.D.C. 1987)	6
<i>Toth v. USX Corporation</i> , 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989)	6
<i>United Steelworkers of America v. American Manufacturing Co.</i> , 363 U.S. 564 (1960)	8
<i>United Steelworkers of America v. Enterprise Wheel and Car Corp.</i> , 365 U.S. 593 (1960)	8
<i>United Steelworkers of America v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960)	8
STATUTES	
Labor Management Cooperation Act of 1978, Pub. L. 95-524, 92 Stat. 1990	2
Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141 <i>et seq.</i> :	4
Section 302(a), 29 U.S.C. § 186(a)	5
Section 302(b), 29 U.S.C. § 186(b)	5
Section 302(c)(1), 29 U.S.C. § 186(c)(1)	<i>passim</i>
National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 151 <i>et seq.</i> :	3
Section 8(a)(2), 29 U.S.C. § 158(a)(2)	3
MISCELLANEOUS	
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)	6

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BRIEF ON BEHALF OF AMERICAN
AUTOMOBILE MANUFACTURERS ASSOCIATION
AS AN AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

This brief is submitted in support of the respondents. Counsel for all parties have consented to the filing of this amicus brief, and their letters of consent have been filed with the Clerk of the Court.¹

¹ Pursuant to Rule 37.6 of the United States Supreme Court Rules, AAMA states that no person or entity, other than AAMA or its members, contributed to the cost of preparing and submitting this brief.

THE INTEREST OF AMICUS CURIAE

The American Automobile Manufacturers Association ("AAMA") is a non-profit trade association whose three members, Chrysler Corporation, Ford Motor Company and General Motors Corporation (the "Companies"), together produce approximately 80% of the cars and trucks manufactured in the United States. AAMA has often represented its members before this Court and other tribunals. AAMA has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

AAMA's purpose in submitting this brief is to apprise the Court of the industry context in which this case should, in our view, be approached. As such, we will not attempt to add extensively to the various legal arguments made by the parties, but wish to make clear that this case has far-reaching ramifications in the labor management and industrial operations areas that are beyond the specific issues that exist between the parties.

AAMA's members have longstanding collective bargaining relationships with several labor organizations, including the United Automobile Workers (the "UAW"). Most of these relationships have existed for over fifty years. Today, over 400,000 of our members' employees are represented by respondents.

Over many years of collective bargaining, our members and the unions that represent their employees have negotiated numerous joint labor management committees, including committees responsible for health and safety, apprentice programs, employee assistance programs, fringe benefits, ergonomics, and quality committees, among others.²

² These joint activities are established in accordance with the Labor Management Cooperation Act of 1978, Pub. L. 95-524, 92 Stat. 1990, which authorizes joint labor management committees for the purpose of improving labor management relationships, job security and organizational effectiveness, enhancing economic development, and involving workers in decisions affecting their jobs.

These committees utilize union representatives who are extensively trained to help operate the committees, with broad knowledge of and experience in the business requirements of their work. In addition, the Companies have one of the world's most sophisticated grievance procedures. Hundreds of thousands of grievances are processed each three-year contract term.

For decades, the joint labor management committees, the grievance procedure and other aspects of contract administration have utilized full-time employee representatives who continue to be paid the same wages and benefits that they would have earned by working on their prior job assignments. These employee representatives are paid on the same basis as the bargaining unit employees they represent and thereby are not disadvantaged for exercising their statutory right to engage in union activities.³ All of these benefits are openly bargained for and set forth in detail in collective bargaining agreements ratified by the membership. The details of these practices are well-known to the U.S. Department of Labor and the U.S. Department of Justice.

AAMA's members have a vital interest in the outcome of this case. Whatever the Court decides, we urge that its ruling be limited to not preclude the longstanding practice of compensating employee representatives engaged in the activities described above. The decision in this case will have a direct and vital bearing on the continued viability and effectiveness of grievance procedures and cooperative labor management committees in which AAMA's members participate. In light of the disruptive effect that an adverse decision could have on the U.S. automobile industry, AAMA respectfully submits this brief amicus curiae.

³ Section 8(a)(2) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. 158(a)(2), expressly permits "no docking" practices for this very reason.

SUMMARY OF ARGUMENT

U.S. automobile manufacturers have developed an extensive framework of joint activities with the UAW covering over 400,000 UAW-represented employees in the U.S. These joint programs are implemented, for the most part, by a combination of company personnel and specially trained union representatives. In addition, the union representatives process hundreds of thousands of grievances each contract term on behalf of represented employees. The Companies pay these representatives the same wages and benefits while engaged in representational activities that they would have received on their prior job assignments. The Companies make these payments in reliance on the language of Section 302(c)(1) of the Labor-Management Relations Act of 1947 (the "LMRA"), 29 U.S.C. § 186(c)(1), as supported by its legislative history and applicable case law.

In the view of AAMA's members, a finding that these payments are illegal or, worse, constitute an indictable crime, would be prejudicial to the Companies and their employees represented by the UAW. This is especially true since this framework of labor management cooperation, based upon Section 302(c)(1), has gone unchallenged after decades of development. Such a determination not only would be unfair, but would significantly disrupt both the Companies' operating practices and the structure of collective bargaining relationships in the U.S. automobile industry.

ARGUMENT

I. A DECISION THAT DEPARTS FROM THE GENERALLY ACCEPTED CONSTRUCTION OF SECTION 302(C)(1) WOULD UNFAIRLY PREJUDICE EMPLOYERS WHO HAVE RELIED ON THE LANGUAGE, LEGISLATIVE HISTORY AND APPLICABLE CASE LAW OF THIS SECTION

After more than fifty years of collective bargaining, the practice of paying employee representatives engaged in representational functions in the grievance procedure or serving on labor management committees has become part of the institutional fabric of industrial relations in the U.S. automobile industry. AAMA's members have relied on the language of Section 302(c)(1), its legislative history and applicable case law. If this practice is now deemed criminal after all these years of justifiable reliance, employers who have developed a system of industrial self-governance based thereon would be unfairly prejudiced. A decades-old system of industrial self-governance would be significantly impaired and the practical operation of automobile manufacturing plants would be compromised.

The statutory language on which the Companies have relied is as follows:

The provisions of [LMRA Sections 302(a) and (b), 29 U.S.C. §§ 186(a) and (b)] shall not be applicable (1) in respect to any money or other thing of value payable by an employer . . . to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . .

LMRA Section 302(c)(1), 29 U.S.C. § 186(c)(1).

We submit that the Companies are justified in relying on this language to pay employees assigned to rep-

representational activities of the type discussed herein. Furthermore, this practice is well-known and has been reviewed over the years in a variety of contexts by the Department of Labor and the Department of Justice.

The legislative history also supports this reliance. When Congress considered what is now Section 302(c)(1), it did so against the background of predecessor legislation that was clearly intended to preserve the existing practice of company pay to employees performing union duties. In the LMRA's conference report, for example, the conferees expressed approval for "allow[ing] shop stewards without losing pay to confer not only with the employer but with employees as well, and to transact other union business in the plant." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 40 (1947).

Therefore, in the context of enacting the LMRA, there was no controversy as to this mode of operation—it was simply recognized as necessary to the continuation of existing law and practice. The statute contained a balance between Congressional concern about bribery, or improper payments, and the continuation of an existing practice that facilitated union management relations. It was in reliance on this balanced approach that employers and unions continued and expanded the pre-existing practice, so that it has now developed into a basic element of labor management relationships in the U.S. automobile industry. This was clearly, then, not the type of practice, or conflict of interest, that Congress sought to prohibit.

Our interpretation of the statute is also supported by applicable case law. *See, e.g., Toth v. USX Corp.*, 883 F.2d 1297, 1304 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989) (Section 302(c)(1) permits payment of union leave benefits pursuant to a collective bargaining agreement); *Communications Workers of America v. Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416, 418-21 (D.D.C. 1987) (finding that benefits granted em-

ployees who were on union leaves (for up to eighteen years) were acceptable under the Section 302(c)(1) exception); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986) (there is nothing in the language or logic of Section 302(c)(1) to suggest that employers are not permitted to grant a *bona fide* employee paid time off in order to do union business).

We therefore submit that to overturn this longstanding practice would be unduly prejudicial.

II. A DECISION THAT CAUSES A REVERSAL OF PRESENT PAY PRACTICES WOULD HAVE A SERIOUS DISRUPTIVE EFFECT ON BOTH MANUFACTURING OPERATIONS AND THE STRUCTURE OF COLLECTIVE BARGAINING RELATIONSHIPS IN THE U.S. AUTOMOBILE INDUSTRY

It is of vital concern to AAMA's members that Section 302(c)(1) be read in accordance with its terms and as intended by Congress. Section 302(c)(1), narrowly construed, would severely disrupt the operation of critical joint labor management activities and the grievance procedure. Specifically, we are concerned about the adverse impact on joint labor management approaches to operations directed toward preserving jobs, improving worker safety, and operating more productively in today's global and intensely competitive automobile industry.

Commencing in the early 1980's, the auto companies and the UAW recognized a need to operate in a more cooperative and extensive manner than had previously been the case. This recognition was based upon the deterioration that had occurred in the domestic automobile industry as a result of a variety of factors, from the oil shortage of the 1970's to the surge of foreign competition in the industry. As a result, the Companies and the UAW embarked on a variety of joint programs to enhance the efficiency and productivity of domestic manufacturers and thus protect the jobs of their workers.

These programs included greater union and employee participation than had ever before been undertaken. As a result, the industry now has joint union management programs for employee education and development, worker quality and efficiency, safety, employee assistance to aid workers with personal and family problems, and joint ergonomics activities, among many other similar programs. Union representatives also participate in numerous bargaining committees addressing difficult competitive issues facing our industry, such as outsourcing, subcontracting, work standards, new technology, and other issues affecting job security.

The administration of these efforts, now undertaken by company personnel along with union representatives, requires significant training and expertise on the part of full-time participants. These are not the types of activities that can be performed well on a part-time basis, or as an adjunct to a production job. In addition to performing traditional representation duties, such as dispute resolution via the grievance process, these representatives, trained and experienced, provide a significant service to the Companies, bargaining unit employees and the unions in administering the joint union management programs.⁴

Industrial self-governance is the cornerstone of federal labor policy. *See United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Union representation plays a key role in the system of industrial self-governance, and the agreements in effect between AAMA's members and the UAW provide for the payment of wages and benefits to

⁴ In addition, from an operational point of view, it is counterproductive to have union representatives periodically leave their workstations each time an employee has a representation matter as compared to the present system of having full time representation to handle matters as they arise.

union representatives performing these representation functions. A ruling from this Court that limits these practices would cause a fundamental disruption of some of the most beneficial programs found in labor management relationships.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be upheld.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC.,
Petitioner,
v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR THE AMERICAN FEDERATION
OF LABOR AND CONGRESS OF
INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
1. History and Nature of In-Plant Multi-Tier Grievance Procedures	5
2. Development and Function of No-Docking Pro- visions	10
3. Full-Time Grievance Handlers	15
4. Impact of Grievance-Handling Cost Distribu- tion on Employees	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	13
<i>Caterpillar Tractor Co.</i> , 2 War Labor Rep. 75 (1942)	13
<i>International Harvester Co.</i> , 1 War Labor Rep. 112 (1942)	12
<i>McQuay-Norris Co.</i> , 9 War Labor Rep. 538 (1943) ..	13, 14
<i>P.R. Mallory & Co.</i> , 36 BNA Labor Arb. Rep. 351 (Arb. Stark, 1960)	5
<i>Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564 (1960)	7, 21
<i>Steelworkers v. Enterprise Wheel Corp.</i> , 363 U.S. 593 (1960)	7
<i>Steelworkers v. Warrior & Gulf Nav. Co.</i> , 363 U.S. 574 (1960)	7, 10, 13
<i>Textile Workers v. Lincoln Mills</i> , 353 U.S. 448 (1957)	13
STATUTES	
29 U.S.C. § 173(d)	21
29 U.S.C. § 186	<i>passim</i>
MISCELLANEOUS	
Catlett & Brown, "Union Leaders' Perceptions of the Grievance Process," 15 Lab. Studies J. (1990)	20
Chamberlain & Kuhn, <i>Collective Bargaining</i> (2d ed. 1965)	<i>passim</i>
Chinoy, <i>Automobile Workers and the American Dream</i> (1955)	16
Clegg, <i>Trade Unionism Under Collective Bargaining</i> (1976)	10, 17
Crane & Hoffman, <i>Successful Handling of Labor Grievances</i> (1956)	7, 16
Davey, <i>Contemporary Collective Bargaining</i> (3d ed. 1972)	19

TABLE OF AUTHORITIES—Continued

	Page
Davy, Steward & Anderson, "Formalization of Grievance Procedures: a Multi-Firm & Industry Study," 13 J. Lab. Res. 307 (1992)	16
Department of Labor, <i>Collective Bargaining Clauses: Company Pay for Time Spent on Union Business</i> , Bulletin No. 1266 (October 1959)	11, 14
Department of Labor, "Grievance Procedure Under Collective Bargaining," 63 Monthly Lab. Rev. 175 (1946)	14
Department of Labor, <i>Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business</i> , Bulletin 1425-19 (October 1980)	4, 5, 14, 15, 19
Duane, <i>The Grievance Process in Labor Management Cooperation</i> (1993)	8, 18
Kornhauser, et al., eds., <i>Industrial Conflict</i> (1954) ..	7, 16
Kuhn, <i>Bargaining in Grievance Settlement</i> (1961) ..	3, 7, 8, 16
Lichtenstein & Harris, eds., <i>Industrial Democracy in America</i> (1993)	11, 13, 20
Lichtenstein, <i>Labor's War at Home</i> (1983)	6
Loughran, <i>Negotiating a Labor Contract; A Management Handbook</i> (1992)	19
Nash, <i>The Union Steward: Duties, Rights, and Status</i> (2d ed. 1983)	9
NLRB, <i>Legislative History of the Labor Management Relations Act of 1947</i> (1948)	12
NWLB, <i>Termination Report</i> (1947)	6, 12, 15
Peach & Livernash, <i>Grievance Initiation and Resolution</i> (1974)	16
Sayles & Strauss, <i>The Local Union</i> (1967)	8, 16, 17, 20
Thomson, <i>The Grievance Procedure in the Private Sector</i> (1974)	14, 17
Weber, <i>The Structure of Collective Bargaining</i> (1961)	14, 21

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BRIEF FOR THE AMERICAN FEDERATION
OF LABOR AND CONGRESS OF
INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.¹

¹ No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST

The collective bargaining agreements negotiated by unions affiliated with the AFL-CIO typically contain multi-stage grievance procedures similar to the procedure at issue in this case. Many of the agreements—particularly those covering employees at large industrial plants—also contain no-docking provisions—that is, provisions allowing covered employees selected by their fellow-employees to serve as part-time or full-time representatives at various levels of the grievance procedure without loss of pay. The complaint filed by Caterpillar, Inc. in this case challenges the legality of these no-docking provisions and thereby threatens the contractual grievance procedures negotiated by AFL-CIO affiliates.

SUMMARY OF ARGUMENT

No-docking provisions that allow employees to continue to receive their normal pay while serving as in-plant grievance-representatives are extremely common in single-employer industrial collective bargaining agreements. The reason for this is that the parties to such agreements have determined that a hierarchical multi-step system of representation, staffed on the workers' side at each step by representatives drawn from the work-group, is the best system for giving voice to the workers' interests and, hence, for resolving disputes. The representatives filling the top positions in this hierarchy necessarily spend all, or almost all, of their worktime on grievance-handling and in-plant problem-solving. Given the historical evolution of this system and the natural progression within each plant's grievance procedure from part-time grievance representatives at the lower steps to full-time representatives at the final steps, it has become common practice for agreements to provide that employers will continue to pay employees their normal pay while they serve as either part-time or full-time grievance-handlers. An interpretation of § 302 of the Labor Management Relations Act forbidding this

practice would completely upset the system of workplace representation that has become common in large unionized facilities.

ARGUMENT

The question before the Court in this case is "whether an employer granting paid leaves of absence to employees who then become the union's full-time grievance chairmen violates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186." Pet. App. 3a. This brief does not revisit the legal arguments supporting the conclusion that the answer to this question is "no," as those arguments are addressed convincingly by the *en banc* majority below, and by the Union in this Court. Rather, we seek to inform the Court's consideration of the question presented by surveying the nature, history and purpose of collective bargaining agreement provisions establishing multi-step grievance procedures and permitting employees chosen for the role by fellow employees to serve as grievance representatives without loss of pay. As we demonstrate, this practice is, and was at the time § 302 was enacted, an exceedingly common one, and has long been understood both by government agencies and by industrial relations experts as a useful component of an effective in-plant dispute resolution system.

Indeed, the standard system for employee representation at firms covered by single-employer collective bargaining agreements is a multi-step grievance procedure, with employee union representatives at each step selected from among the group they serve. The contract between Caterpillar and the UAW here at issue is a good example of the "typical [labor] agreement . . . which provides for successive steps through which a worker and his representative may take a grievance. . . ." Kuhn, *Bargaining in Grievance Settlement* 6 (1961). Like the Caterpillar/UAW contract, such agreements "commonly . . . provide for four steps" with "[t]he participants at each succeeding step [being] higher-ranking officers of manage-

ment and union." *Id.* See Jt. App. 5-6, 43-47. The grievance chairman and alternative committeeman at Caterpillar, which are the positions in dispute in this case, handle grievances at the third and fourth steps of the procedure. *Id.* If a grievance is not resolved by the fourth step, the UAW International Union may take the dispute to arbitration. Third Cir. App. 54.

The hierarchy of the multi-step grievance procedure tends to bring forward a few key grievance handlers in each plant. The employee union representatives at the top of the hierarchy play a key role both in processing formal grievances plantwide or for several departments, and in resolving disputes informally. Performing these functions can be quite time-consuming and, in larger workplaces, the employees occupying these top slots generally spend all or almost all of their work-time handling labor problems.

Like the Caterpillar/UAW agreement, most collective bargaining agreements establishing a multi-step, in-plant grievance procedure provide that the employees selected by their fellow employees to present grievances to management may perform their representative functions during work-time with no loss of pay. More than half of the unionized private sector workforce is covered by collective bargaining agreements expressly providing that employees may carry out their functions as grievance representatives during employer-paid work-time. U.S. Dept. of Labor, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business*, Bulletin 1425-19 (October 1980) ("*Employer Pay and Leave for Union Business*"), Table 1, p. 32. Such contract provisions (termed "no-docking provisions" in this brief) are especially prevalent in manufacturing, covering almost two-thirds of union-represented workers in that sector. *Id.*²

² A major reason for this concentration in manufacturing is that manufacturing agreements, which tend to cover larger facilities and larger employers, are not likely to be multi-employer agree-

By contrast, only one out of ten manufacturing agreements expressly state that employees will *not* be paid for time spent on grievance-handling, with the remaining one-quarter of such agreements silent on the matter. *Id.* And even where the contract is silent, the parties are as likely as not to follow a practice of allowing employees to take paid-time for grievance handling. *Id.* at 6.²

An interpretation of LMRA § 302 forbidding the common practice of allowing employee union representatives in the grievance procedure to continue being paid by the employer would therefore have a profoundly unsettling effect on many established grievance procedures, and on the overall collective bargaining relationship in workplaces in which such procedures have been established.

1. *History and Nature of In-Plant, Multi-Tier Grievance Procedures.*

No-docking provisions such as the one at issue here arose in conjunction with the development of the multi-step grievance procedures common to industrial collective bargaining agreements. To understand the reasons such compensation provisions became standard in many industries, it is most useful to begin by considering the development and characteristics of the kind of dispute resolution

ments. While grievances under single-employer collective bargaining agreements are likely to be handled by representatives chosen by the employees from among their own ranks, grievances under multi-employer agreements are more likely to be handled by union staff members, such as business agents. Dept. of Labor, *Employer Pay and Leave for Union Business* 4.

² The U.S. Department of Labor has consistently taken the position that payments to employee union representatives made pursuant to collectively bargained no-docking arrangements fall within the LMRA § 302(c) exceptions allowing such payments and hence do not have to be reported on the financial reports required by the Labor Management Reporting and Disclosure Act. See *P.R. Mallory & Co.*, 36 BNA Labor Arb. Rep. 351, 367-368 (Arb. Stark, 1960) (describing the LMRDA reporting requirements in this regard and the Department of Labor's position).

system in which no-docking provisions are typically embedded. That consideration indicates that the multi-step grievance process depends for its effectiveness on employee representatives who come from inside the workforce and remain closely associated with their fellow-employees on a day-to-day basis, rather than on professional union staff serving many workplaces but organically attached to none. Thus, to put the matter in the terms of LMRA §302(c)(1), there can be little question that the employee representatives in this sort of grievance procedure were chosen to fill their positions "by reason of [their] service as an employee of such employer." 29 U.S.C. § 186(c).

Multi-tier grievance systems ending in arbitration were first introduced in collective bargaining agreements covering the anthracite and garment industries just before World War I. Chamberlain & Kuhn, *Collective Bargaining* 147-149 (2d ed. 1965). This method of grievance resolution was later taken up by the mass-production unions, such as the UAW, that formed the Congress of Industrial Organizations in the 1930's. *Id.* These grievance procedures became firmly ensconced as a standard feature of American labor relations during World War II, when the National War Labor Board embraced such procedures as representing "the best practices of employers and unions, developed through years of collective bargaining and of trial and error. . . ." *The Termination Report of the National War Labor Board*, vol. 1, p. 65 (1947) ("*NWLB Termination Report*"). See Lichtenstein, *Labor's War at Home* 178-179 (1983).

Under this method of grievance handling, the employee union representatives who present grievances at the pre-arbitration steps of the procedure overwhelmingly tend to be drawn from the ranks of the represented group. In large facilities in particular, the selection of employee representatives from the ranks of the represented group is essential to the effective operation of the grievance procedure. For, as the National War Labor Board's con-

cluded, the prompt and effective resolution of grievances "[is] best assured when immediate, initial attention [comes] from those in the plant who ha[ve] intimate knowledge of the complaint" Kuhn, *Bargaining in Grievance Settlement* 5.

The primary reason for reliance on employee grievance-handlers is that, "[b]y contrast [with contract negotiation], the province of grievance negotiation is each local workplace and the process involves primarily the *daily* adjustment of *individual* rights." Kennedy, "Grievance Negotiation," in Kornhauser, *et al.*, eds., *Industrial Conflict* 280 (1954) (emphasis supplied). To take a non-random sample, the type of issues that are "grist in the mills" of such grievance procedures, *Steelworkers v. Warrior & Gulf*, 363 U.S. 574, 584 (1960), can range from whether a particular employee is "physically able to do the work," *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 564-565 (1960), to whether a company's "contracting out work to other concerns, that could and previously has been performed by Company employees . . . becomes unreasonable, unjust and discriminatory in lieu [*sic*] of the fact that at present there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work," *Warrior & Gulf*, 363 U.S. at 575-576, to whether discharge was too severe a penalty for "[a] group of employees [who] left their jobs in protest against the discharge of one employee," *Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 595 (1960).

In order to effectively handle such localized issues, grievance representatives must be "intimately acquainted with the people and the problems of their units." Crane & Hoffman, *Successful Handling of Labor Grievances*, 104 (1956). See Chamberlain & Kuhn, *Collective Bargaining*, 151 (describing how this knowledge comes into play during grievance negotiation). Plant-based representatives can develop such expertise and familiarity, since they are 'continually able to sound out their constituents as to the relative importance of different demands,' thereby allow-

ing "the rank and file [to] exercise considerable influence over the processing of grievances." Sayles & Strauss, *The Local Union* 152-153 (1967).

The availability of on-site representatives with a background in the workplace "give[s] the workers an opportunity to express themselves and also require[s] the directors of their work lives to hear and to consider their problems seriously." Kuhn, *Bargaining in Grievance Settlement* 23. By the same token, the represented workers' confidence in their representative's intimate understanding of their condition is important to their willingness to accept resolutions of their grievances negotiated by that representative. See Chamberlain & Kuhn, *Collective Bargaining* 157 ("peaceful grievance settlement can be assured . . . only as long as workers can expect and are willing to fulfill their job demands through the regular union organization"). If they feel their designated representatives are not responsive to their needs, "the workers still have a final recourse: following their 'informal' leaders, they can resort to wildcat strikes, work restriction, and other forms of self-help." Sayles & Strauss, *The Local Union* 150. And, in turn, the grievance-handler's knowledge of her constituency gives her the confidence necessary to resolve disputes by compromise with management. Duane, *The Grievance Process in Labor Management Cooperation* 97 (1993) ("when representatives have little or mixed information about their constituents' expectations or desires, their negotiating approach is typically more aggressive than if they were negotiating on their own behalf").

Once established, then, the workplace-based grievance representatives serve to enhance the voice of their employee constituents more effectively than representatives who arrive intermittently from outside the workplace to deal with disputes.⁸ Indeed, such on-site representatives

⁸ The grievance chairman at Caterpillar's York plant is stationed at the Local Union office, which is less than a mile from that facility. Jt. App. 60; Third Cir. App. 610. The Union would have preferred that the York grievance chairman work out of an in-plant office, as

tend to create "a power center at the place of work—within, though not necessarily an integral part of, the local union." Chamberlain & Kuhn, *Collective Bargaining* 160.

Positions such as grievance chairman, committeeman and steward are, as here, most often created by the collective bargaining agreement, rather than by the union constitution or bylaws. See Third Cir. App. 210-211. The workplace channels for employee expression created by the contractual grievance procedure are thus distinct from the governance procedures of the union as a membership organization. In these circumstances, it can be said that "unions possess two governments rather than one," each with "a distinct and an appropriate structure":

One government, the executive board, is concerned with relations within the union and is formed in accordance with the local constitution and bylaws. The other government, the shop stewards and shop committee, is concerned with relations with the employer and is formed in accordance with the collective bargaining agreement. [Nash, *The Union Steward: Duties, Rights, and Status* 12 (2d ed. 1983).]

And it has been suggested that, "[i]n the daily informality of the work group," which is the province of the second form of government, "workers probably have a better chance to participate in decisions, to be heard, and to make their influence felt than in even the local union." Chamberlain & Kuhn, *Collective Bargaining* 161.

It is, therefore, not an accident that every country with an advanced system of collective bargaining has found some form of "workplace organization" to be essential to

is the practice at Caterpillar's Peoria plant, but the Company insisted that he work out of the Local Union hall. Jt. App. 16, 60. Even so, the York grievance chairman spends at least a day and half each week in the plant. Third Cir. App. 612.

industrial stability. See Clegg, *Trade Unionism Under Collective Bargaining* 55-68 (1976). Whereas in some countries, such as Germany, the "workplace organization" takes the form of statutory works councils, in the United States it has taken the form of in-plant grievance procedures. *Id.* at 58-63. The workplace-based nature of the typical industrial grievance procedure in the United States is essential to the attempt to "regulate all aspects of the complicated relationship [among workers and management in a large industrial facility], from the most crucial to the most minute over an extended period of time." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 580. As a result, "the grievance machinery . . . is at the very heart of the system of industrial self-government." *Id.* at 581.

2. Development and Function of No-Docking Provisions.

Precisely because "the workers themselves elect stewards or committeemen from among the ranks of their own department or work group," rather than from professional union staff, Chamberlain & Kuhn, *Collective Bargaining* 156, the question arose whether these workplace-based representatives should continue to be paid by the employer while carrying out their grievance functions, thereby carrying on in large part as members of the represented workplace. No-docking provisions in collective bargaining agreements developed as part of the workplace-based, hierarchical grievance systems themselves, and reflect in large part the preference in such systems that pre-arbitration grievance-handlers remain as much as possible rank-and-file employees rather than professionals on the union staff.

"To ensure the availability of grievance settlement, unions must provide an adequate number of representatives at the place of work." Chamberlain & Kuhn, *Collective Bargaining* 156. Moreover, "[a]greements almost

always guarantee [such] representatives the right to interrupt their jobs . . . and move about appropriate areas of the plant to talk with workers, other union officers, and foremen." *Id.* In manufacturing plants, it is not at all uncommon for even stewards, who handle grievances at the first step, to spend more than half of their work-time on grievance-related activities. Nash, *The Union Steward* 14. But few rank-and-file employees have the luxury of inherited trust funds to support them and their families; therefore, some provision must be made in collective bargaining agreements for assuring that the employees selected to perform that task are able to do so on a paid rather than volunteer basis. In short, because "[w]orkers designated or elected to serve as shop stewards or committeemen . . . are frequently called away from their regular jobs to carry out such responsibilities," it is no coincidence that collective bargaining agreements providing for such in-plant representation also typically contain "provisions . . . designed to protect these union representatives, when so engaged, from loss of wage income." U.S. Dept. of Labor, *Collective Bargaining Clauses: Company Pay for Time Spent on Union Business*, Bulletin No. 1266, p. iii (October 1959).

The precise historical link between the development of modern industrial grievance procedures and the provision for paid leave allowing employees to staff such procedures is indicated by the course of collective bargaining in the automobile industry. A key feature of the 1940 General Motors-UAW agreement was the introduction of a modern grievance-arbitration procedure. Lichtenstein, "Great Expectations: The Promise of Industrial Jurisprudence and its Demise, 1930-1960," in Lichtenstein & Harris, eds., *Industrial Democracy in America* 29 (1993). One year later, the 1941 UAW-GM agreement included no-docking provisions that allowed Committeemen and the Chairman of the Shop Committee to use paid work-time for grievance handling. Third Cir. App. 335. That same year, the Ford-UAW agreement also contained a no-

docking clause, which expressly provided that "[a]ll building chairmen shall devote their full time to their duties as such" and "shall receive the same wages which were received by them on their respective jobs at the time they become building chairmen. . . ." *Id.* 295. Two years later, in 1943, similar provisions became part of the Chrysler-UAW agreement. *Id.* 376.

During World War II, the National War Labor Board frequently considered whether to impose such part or full-time no-docking provisions in order to improve the operation of grievance procedures included in collective bargaining agreements. 1 *NWLB Termination Report* 124-129. The War Labor Board had the authority to require the inclusion of such clauses in the course of resolving particular labor disputes that threatened to disrupt the war effort.

The War Labor Board first confronted the grievance-handler compensation issue in *International Harvester Co.*, 1 War Labor Rep. Rep. 112 (1942), where it ordered the inclusion of a clause providing that "Union representatives who are employees shall not lose pay during the time spent in handling grievances within the plant." *Id.* at 114. The Board's rationale was that "the practice of quickly investigating and promptly disposing of grievances . . . should be encouraged" and that the adoption of a no-docking clause "will eventually mean greater efficiency and higher morale [and] . . . a healthier company-union relationship." *Id.* at 122.⁴

⁴ The *International Harvester* opinion was written by Wayne Morse, *id.* at 114, who, as a member of the Senate Labor Committee in 1947, participated actively in the debate over the Taft-Hartley Act. Senator Morse made a lengthy speech in opposition to the amendment that was enacted as § 302. NLRB, *Legislative History of the Labor Management Relations Act of 1947* (1948), vol. II, pp. 1317-20. His grounds of opposition were that the amendment would interfere with the established practice of negotiating union-administered benefit funds without adequate investigation into the extent and nature of those arrangements or the state law governing

The next case in which the Board confronted this issue concerned the employer in this case, Caterpillar. *Caterpillar Tractor Co.*, 2 War Labor Rep. 75 (1942). Once again, the Board ruled that "the contract should provide for compensation for union representatives who lose time in handling grievances." *Id.* at 95.⁵ Explaining its decision, the Board stated:

The adjustment of grievances . . . is business in which the union and the company are equally interested. The practice of paying union representatives while they are handling grievances is very common in industry. [*Id.*]

The Board's general approach to the no-docking issue was summed up in *McQuay-Norris Co.*, 9 War Labor Rep. (1943),⁶ as follows:

[T]he question of company payment to union representatives for handling grievances . . . can only be

them. *Id.* at 1318. Senator Morse authored or joined a number of War Labor Board decisions concerning the issue of no-docking provisions, including the three decisions discussed in text here. If he believed that § 302 would outlaw such provisions, he certainly would have said so. Yet, neither he nor any other Senator even suggested that these provisions, which had received such widespread attention in the War Labor Board decisions, would be at all affected by § 302.

⁵ The panel recommendation adopted by the Board in *Caterpillar* was authored by Harry Shulman, *id.* at 96, a labor law scholar with "vast and extraordinarily successful experience . . . as a labor arbitrator, especially under the collective-bargaining contract between the Ford Motor Co. and the UAW-CIO." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 463 (1957) (Frankfurter, J., dissenting). See *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 578 (citing Dean Shulman's views on resolution of labor grievances); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 n.16 (1974) (quoting Dean Shulman).

⁶ The opinion in *McQuay-Norris* was written by George Taylor, a prominent labor arbitrator who served as a neutral umpire under the GM-UAW agreement. See Lichtenstein, *Industrial Democracy in America* 135.

properly considered as a phase of the problem of making collective bargaining work most effectively in the prompt and equitable handling of grievances over the interpretation and application of the terms of labor agreements. [*Id.* at 542.]

While "the basic structure of present-day grievance procedures had evolved by the end of World War II," particular features of the structure continued to evolve after the war. Thomson, *The Grievance Procedure in the Private Sector* 7-8 (1974). Thus by 1947, when Congress enacted § 302, no-docking agreements were a common feature of industrial relations. U.S. Department of Labor, "Grievance Procedure Under Collective Bargaining," 63 Monthly Lab. Rev. 175, 184 (1946). By 1959, when Congress amended § 302, just over half of all manufacturing collective bargaining agreements contained no-docking provisions. Dept. of Labor, *Company Pay for Time Spent on Union Business* Table 1, p. 3. And by 1980, the number of manufacturing agreements containing such provisions had grown to nearly two-thirds. Dept. of Labor, *Employer Pay and Leave for Union Business* Table 1, p. 32. See pp. 3-4, *supra*.⁷

⁷ The agricultural implement manufacturing industry tended to lag behind in the development of well-functioning grievance procedures. McKersie, "Structural Factors and Negotiations in the International Harvester Company," in Weber, *The Structure of Collective Bargaining* 279-303 (1961). The problems with grievance handling experienced in this industry did not begin to subside until the end of the 1950s, due in part to intra-union rivalry that persisted until that time. *Id.* The relatively delayed development of the grievance handling machinery in this industry was reflected in the industry pattern of no-docking and compensation continuity provisions. While the War Labor Board imposed as-needed no-docking provisions on agriculture implement manufacturers in the early 1940s, it was not until the early 1970s that the collective bargaining agreements in this industry began to provide for full-time paid leave for grievance chairmen. Jt. App. 57-58; Third Cir. App., 270 (1971 Deere agreement). By contrast, such full-time no-docking provisions appeared in automobile manufacturing agreements as early as 1941. Third Cir. App. 295.

In sum, as the very term "no docking" suggests, the practice of employer payment of compensation to employee grievance representatives was perceived from the outset as a way of assuring that employees selected to perform this task are not penalized by the employer for doing so by losing pay at the usual rate. As we develop immediately below, the assignment of some employees to grievance-handling on a full-time basis, and the application of no-docking provisions to these full-time grievance-handlers, arises organically out of the nature of the grievance procedure and does not present any principled difference from the part-time assignment of employees to this function.

3. Full-Time Grievance Handlers.

The need for full-time grievance-handlers arises from the hierarchical structure of the typical industrial grievance procedure itself. "The degree of involvement in grievance activity, and consequently the amount of time needed, is likely to vary with the union official's position." Dept. of Labor, *Employer Pay and Leave for Union Business* 8. The higher level representatives "handle grievances constantly," Chamberlain & Kuhn, *Collective Bargaining* 155, "giv[ing] all or almost all their time to union business." Clegg, *Trade Unionism Under Collective Bargaining* 61.

From its inception and by its basic design, the modern grievance procedure is hierarchical. Jt. App. 59 (describing the typical UAW grievance procedure). Thus, the War Labor Board "stressed the importance . . . of making sure that [there are] different people at the different steps." 1 *NWLB Termination Report* 113. The theory behind this recommendation is that "[a]t each of several succeeding steps, the grievance may be appealed to higher-ranking officers who are less likely to be involved in the case and better able to judge it on its merits." Chamberlain & Kuhn, *Collective Bargaining* 151. Compared to part-time grievance handlers, such as stewards, the rep-

representatives at the higher levels are "assumed to be more conversant with the agreement, more familiar with union-management policies and practice, and able to judge the single issues in a context of total plant relationships." Kennedy, "Grievance Negotiation," in Kornhauser, *et al.*, eds., *Industrial Conflict* 289 (1954).

"[U]nions tend to focus authority for grievance resolution on a few individuals above union stewards." Davy, Steward & Anderson, "Formalization of Grievance Procedures: A Multi-Firm and Industry Study," 13 J. Lab. Res. 307, 309 (1992). See Sayles & Strauss, *The Local Union* 21-22. Thus, in the typical industrial labor agreement, "[t]he chairman of the grievance committee ha[s] a strong role in the formal grievance procedure." Peach & Livernash, *Grievance Initiation and Resolution* 86 (1974). Unlike the lower level stewards and intermediate level committeemen, who "confine[] [their] investigation to the department, district, or division [they] represent[]," the "chairman of the grievance committee is granted, in many contracts, permission to handle grievances throughout the entire plant." Crane & Hoffman, *Successful Handling of Labor Grievances* 99-100.

"The Chairman's job is to make sure the contract works," Jt. App. 62, and more is entailed in this problem-solving role than can be discerned from the description of his formal position in the collective bargaining agreement. See, e.g., *id.* at 87-88. Employee representatives at the higher stages of the procedure not only "deal with the most difficult grievances from all parts of the plant," they "carr[y] on the day-to-day negotiations with plant management with regard to general shop issues. . . ." Chinoy, *Automobile Workers and the American Dream* 103 (1955). As one leading authority has put it, "The grievance-committee step not only helps put out fires, but is like a professional fire department that also seeks to prevent fires before they start." Kuhn, *Bargaining in Grievance Settlement* 7. The problems addressed "are so

complex, varied, and unpredictable in their frequency and intensity that they cannot be forced into predetermined procedural channels." Thomson, *The Grievance Procedure in the Private Sector* 19. As a result, "the so-called grievance procedure . . . verges on a continuous process of problem solving." Sayles & Strauss, *The Local Union* 13.

The presence of elected employee representatives, who spend all or virtually all, of their work-time handling employee complaints and serving on joint employer-employee committees, is therefore a common feature of mature plant-based representational systems. Clegg, *Trade Unionism Under Collective Bargaining* 58-61 (comparing Germany, Sweden & the United States in this regard). And the plant-based grievance representatives' "independence, influence with the workers, and administrative duties (formal and informal) give them a position of importance in the shop," so that "they become secondary or even equal centres of power in the shop, sometimes rivaling the foreman and his line superiors." Chamberlain & Kuhn, *Collective Bargaining* 157. See Sayles & Strauss, *The Local Union* 21 ("chief stewards . . . feel freer from possible retribution").

The responsibilities of the grievance committee chairman are such, then, that handling grievances or similar employee matters is virtually a full-time job. Jt. App. 59-60. Prior to the 1973 collective bargaining agreement between the UAW and Caterpillar, the grievance committee chairman, as one of the grievance committeemen, was allowed to handle grievances during work-time on an as-needed basis without any loss in pay. Third Circuit App. 276-278. In 1973, the parties agreed that there would be a full-time grievance chairman, who would spend all of his work-time handling grievances or serving on various joint employer-employee committees.

Jt. App. 58-59.⁸ In 1979, the parties agreed to treat the alternate committeeman in the same way. Third App. 167.

Caterpillar and the UAW could, presumably, have agreed instead to continue the earlier practice of part-time higher-level grievance representatives rather than two full-time ones, but they evidently preferred the continuity provided by fewer individuals handling grievances at the upper levels of the dispute resolution system. And, the evidence here shows that the employer found it more efficient for the plant's operations to have full-time employee representatives rather than part-time individuals leaving their job posts at unpredictable times to carry out their representational duties. Jt. App. 59-60. The choice is inherently one of practicality rather than principle and does not change the basic legal relationships among the employer, the union, the employee representative, and the employees.

4. *Impact of Grievance-Handling Cost Distribution on Employees.*

A final factor in the development of workplace-based grievance representation for employees is that the cost of such employee representation is significant. Caterpillar asserts that the annual cost of providing wages and benefits to the grievance chairmen and the alternate committeemen in its various plants approaches \$2 million. Third Cir. App. 167. See Duane, *The Grievance Process in Labor-Management Cooperation* 74 (no-docking provisions cost General Motors \$13 million in 1969). Because the expense is not trivial, and because the expense is identical in form to that incurred on behalf of other employees

⁸ The chairman would continue to collect his normal pay from Caterpillar, except that the Local would cover his pay for periods when he was engaged in Union activities that are unrelated to grievance-handling or similar problem-solving at the plant. Third Civ. App. 50, 613-614.

—wages, benefit contributions, holiday pay, and so on—the amount paid by the employer to employees serving in the workplace-based employee representation system is perceived, in determining the overall cost of the collective bargaining agreement, as simply part of the cost of the total wage-benefit package. See Davey, *Contemporary Collective Bargaining* 337 (3d ed. 1972) ("To the employer, labor cost is labor cost."); Loughran, *Negotiating a Labor Contract: A Management Handbook* 311 (1992) ("To the extent possible, all contractual changes that have an ascertainable cost impact should be included in the settlement package cost estimates.").

Because the employer is simply continuing to pay employees who remain active in the plant on plant-related business regular collectively-bargained wages and benefits and doing so as part of the regular payroll, it is extremely unlikely that either the employer or the employees perceives the compensation as flowing to the elected representatives by virtue of their representational role, rather than by virtue of their status as employees as of the time they are chosen to serve. This employer-provided continued compensation is not cost-free to the employees, there are inevitably trade-offs elsewhere in the wage-benefit package to cover the employers' agreement to pick up this expense. The affected workers, nevertheless, repeatedly demonstrate their willingness to accept such trade-offs by ratifying agreements that include no-docking provisions. See Dept. of Labor, *Employer Pay and Leave for Union Business*, Text table 7, p. 6 (no-docking provisions appear in 93% of UAW agreements covering 97% of UAW-represented employees). And this acceptance is understandable since the alternative means of paying for in-plant employee representation—payment from the union treasury—would not be cost-free to the employees either, and could create economic incentives inconsistent with the most effective workplace representation.

If unionized workers are deprived of the services of plant-based representatives currently paid on a no-docking basis by the employer, the most likely effect would be to diminish the role of elected employee representatives in favor of an enhanced role for professional union staff generally and International Union Representatives particularly. The employees have already "taxed" themselves for the in-plant representatives by ratifying a collective bargaining agreement incorporating the wage-benefit trade-off for the employer's agreement to allow paid employees to play this role. That being so, they are unlikely to vote to tax themselves once again in the form of higher dues payments to finance the costs of in-plant representatives. Instead, the most likely means of filling the void is to assign the International Representatives, i.e., professional union staff from outside the plant, to handle all steps of the grievance procedures. Such International Representatives already assist grievance chairmen at the higher steps of the contractual procedure. The result of assigning the International Representatives to all steps would be that the multi-stage procedure will be effectively compressed into a single step and the salutary effects of workplace-based representation described above will be lost.

While the International Representatives serve a valuable function in managing the more legalistic procedure, see Lichtenstein, *Industrial Democracy in America* 137, they "do not have regular contact with the rank and file," Sayless & Strauss, *The Local Union* 145, and need to be "assisted by a local officer or grievance committee member," if they are to successfully resolve local problems. Catlett & Brown, "Union Leaders' Perceptions of the Grievance Process," 15 Lab. Studies J. 54, 60 (1990). It is, therefore, all but certain that the International Representatives will not be sufficiently part of the "network of relationships" that constitutes the actual grievance procedure in the plant to adequately fill the role of the grievance chairman. N. Chamberlain, "De-

terminants of Collective Bargaining Structures," in Weber, *The Structure of Collective Bargaining* 17.

The 1947 Congress that enacted LMRA § 302 also enacted LMRA § 203(d), which provides that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d). See *Steelworkers v. American Mfg. Co.*, 363 U.S. at 566. An interpretation of § 302 that would bar employers from continuing to pay full-time workplace-based grievance-handlers would profoundly change the "method for settlement of grievance disputes" that has evolved in American industry over the course of this century. There is no indication that the 1947 Congress intended to hinder the ability of employers and labor unions to order the system of workplace representation in this regard as they see fit, and the statute passed by that Congress should not be given an interpretation that has such an effect.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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